IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

No. 76-484

EUGENE McCARTHY, THOMAS McCANNE, ANNIE LYON, ROBERT BLOOM, SUZANNAH B. HYATT, MARY MERRILL, JUDITH DELPHIA, and WILLIAM NERIN

PETITIONERS

v.

JAMES CARTER, GERALD FORD, 1976 DEMOCRATIC PRESIDENTIAL CAMPAIGN, INC., PRESIDENT FORD COMMITTEE, LEAGUE OF WOMEN VOTERS EDUCATION FUND, AMERICAN BROADCASTING COMPANIES, INC., CBS, INC., NATIONAL BROADCASTING SYSTEM, INC., and THE FEDERAL COMMUNICATIONS COMMISSION

RESPONDENTS

* * *

No. _____

EUGENE McCARTHY

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

RESPONDENT

* * *

PETITION FOR WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold Buchman
540 Tower Building
Baltimore, Maryland 21202

David Meyers
1015 20th St., N.W.
Washington, D.C.

John C. Armor & Philip L. Marcus
425, 711 W. 40th Street
Baltimore, Maryland 21211
Attorneys for Petitioners

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a Writ of Certiorari issue to the U.S. Court of Appeals for the District of Columbia Circuit prior to final judgment of said Court in the first case herein and a Writ of Certiorari issue to the said Court prior to judgment in said Court's review of an Order of the Federal Communications Commission, the second case herein, both cases respecting the 1976 "Presidential Debates."

Opinions Below

The opinions of the District Court and Court of Appeals below are annexed hereto, as is the order of the Federal Communications Commission, each as an appendix.

Jurisdiction

The granting of a writ of certiorari prior to exhaustion of the normal appellate review is an extraordinary measure which is rarely employed, and only in those cases with such public importance, and urgency, that an immediate ruling by the Supreme Court. U.S. v. United Mine Workers (1947), 330 U.S. 258, at 269, 91 L.Ed. 804,

v. Sawyer, 343 US 579 at 900; Youngstown Sheet & Tube; U.S. v. Nixon, 418 U.S. 683, at 686-7, 41 L.Ed.2d 1039, at 1051, 1052. See 28 USC 1254(1) and S.Ct.R. 20.

If the Court believes that it is quite possible, on the uncontested facts of this case, that separate is inherently unequal in the field of debates by presidential candidates, and that adequate after-the-fact relief does not exist, then the urgency is the second debate, set for the evening of 6 October, 1976.

The public importance is the determination of the candidate who can and will be elected President of the United States in 1976.

In addition to the slip opinions supplied to the Supreme Court in McCarthy v. Briscoe, Oct.Term 1975, Nos. A-201 and A-247, the additional law on point and now available is McCarthy v. Kirkpatrick, USDC, WD of Mo., Central Division, 24 Sept. 1976, attached as Exhibit D, and McCarthy v. Hardy, USDC, E.D. of La., 27 September 1976 (stay pending appeal denied, CA 5, 29 September 1976), attached as Exhibit E.

Question Presented

I. If broadcasters play a critical and essential role in the establishment of a presidential candidates'

debate, knowing and cooperating with the intention of two such candidates to exclude the only other candidate with a mathematical chance of victory, and drawing more than 5% in the polls, do they violate 47 USC 315(a), the Aspen Opinion, and Chisholm v. FCC, Et al, U.S. Ct. of App. for D.C., No. 75-1951 and 75-1994, 12 April 1976?

History of the Litigation

The first case whose review is sought herein was filed on 10 September, 1976, shortly after Senator McCarthy was informed by a newspaper article that the League would not invite him to participate.

On 17 September, 1976, the District Court dismissed that case, and appeal was immediately taken. (Parties in Anderson v. Ford, U.S.D.C., D.C., Case No. 76-1672, consolidated with McCarthy v. Carter in District Court, took no appeal, nor other steps.)

On 21 September, 1976 the Court of Appeals ordered the Appellees to file written answers by noon, 22 September, and it issued its Order denying injunction pending appeal at 5:30 p.m. on that date. No further activity has occurred in that appeal.

The first debate was conducted as scheduled (except for the 28-minute silence), in Philadelphia on

23 September, 1976.

McCarthy then filed the FCC complaint, against the three networks in the Carter case plus the Public Broadcasting System, on 24 September, 1976. The FCC decision was handed down on or about 4 October, 1976.

The FCC decision was appealed the same date to the Court of Appeals, and McCarthy moved that the Court of Appeals cases be consolidated. At the filing of this Petition, consolidation has probably been accomplished.

Appellants then sought in the alternative expedited consideration by the Court of Appeals, or writ of certiorari and expedited consideration by this Honorable Court.

Statutes Involved

The statute herein involved is 28 USC 315, not set out herein in full, due to its length. Also involved is the "Fairness Doctrine," created by the Federal Communications Commission, pursuant to its regulatory power of 47 USC 151 et sequa.

Reasons for Granting the Writs

The only fact in the complaint to both the U.S. District Court and the FCC which was not a matter of public knowledge at filing was the ballot status of Eugene McCarthy. That is now established. See Exhibit F.

The briefs in the District Court and Circuit Court are adopted herein by reference. See Exhibits G and H, attached.

In summary, if Eugene McCarthy can be lawfully excluded from a Presidential Debate by knowing action of broadcasters, then so could the only other candidates who had potential for an electoral college majority and support of 5% or more, Roosevelt in 1912, LaFollette in 1924, Wallace in 1968. (The 5% standard is found in both the Federal Election Funding Act, and the Secret Service Act.) In short, an indefinite monopoly of the Presidency would belong to the Democratic and Republican Parties, as a result of such an interpretation of the Aspen Opinion of the FCC.

Relief Sought

Since the second debate will take place 6 October 1976, unless restrained by this Court, since the debates

are unique and irreplaceable campaign opportunities, and since the absence of any candidate is an accusation that he cannot win, and should not be supported, if this Court is satisfied that the Constitution is violated in these facts, for the same reason it should issue injunctive relief in aid of its jurisdiction.

Respectfully submitted

Harold Buchman
540 Tower Building
Baltimore, Maryland 21202

David Meyers
1015 20th St., N.W.
Washington, D.C.

John C. Armor
425, 711 W. 40th Street
Baltimore, Maryland 21211

Philip L. Marcus
425, 711 W. 40th Street
Baltimore, Maryland 21211
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of October, 1976, that I will personally or through co-counsel hand-deliver to each of the listed attorneys, within two hours of filing this certificate, the following documents:

Documents

Petition for Writ of Certiorari

Motion for Injunction Pending Certiorari

Certificate of Service of above documents

Attorneys

for ABC: Carl A. Ramey, Esq.
McKenna, Wilkinson & Kittner
1150-17th St., N.W.
Washington, D.C.

for CBS: J. Roger Wollenberg, Esq.
1666 K Street, N.W.
Washington, D.C.

for NBC: Howard Monderer, Esq.
NBC, 1800 K Street, N.W., Suite 610
Washington, D.C. 20006

for PBS and for League of Women Voters Education Fund:
Theodore D. Frank, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006

for FCC: Werner R. Hartenberger, Esq.
Federal Communication Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

for James Carter and the 1976 Presidential Campaign Committee, Inc.:
Ronald D. Eastman, Esq.
Verner, Lipfert, Bernhard, McPherson & Alexander
Suite 1100, 1660 L Street, N.W.
Washington, D.C. 20036

for Gerald Ford and The President Ford Committee:
Robert P. Visser, Esq.
Room 250, 1828 L Street, N.W.
Washington, D.C. 20036

I am a member of the Bar of the Supreme Court of the United States.

Harold Buchman

Harold Buchman

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TOM ANDERSON, et al.,
Plaintiffs,
v. : CIVIL ACTION 76-1672
GERALD FORD, et al.,
Defendants

FILED
SEP 17 1976
JAMES F. DAVEY, CLERK

EUGENE McCARTHY, et al.,
Plaintiffs,
v. : CIVIL ACTION 76-1697
JAMES CARTER, et al.,
Defendants

ORDER

This matter came before the Court on the Motions of Plaintiffs for Preliminary Injunction or for Summary Judgment and upon the Motions of Defendants to Dismiss the Complaints or for Summary Judgment.

The Court having considered the pleadings, the motions, affidavits, memoranda and argument of counsel, and having concluded that no injunction should issue and that the complaints should be dismissed, it is, therefore this 17th day of September, 1976,

ORDERED that the Plaintiffs' Motions for Preliminary Injunction or for Summary Judgment are hereby DENIED, and, further, it is

N-EXH. A

N EXH. A

ORDERED that the Complaints in these actions are hereby dismissed with prejudice, Plaintiffs to bear all costs.

AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1865 — September Term, 19 76

Civil Action 76-1697

Eugene McCarthy, et al.,
Appellants

v.

James Carter, et al.

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 22 1976

GEORGE A. FISHER
CLERK

Before: McGowan and Leventhal, Circuit Judges.

O R D E R

Upon consideration of appellants' motion to expedite appeal or, in the alternative, for injunction pending appeal and papers filed in support thereof, appellees' oppositions thereto, and the motion of Pacific Legal Foundation to participate as amicus curiae and Pacific Legal Foundation's lodged memorandum in opposition to appellants' motion for injunction pending appeal, it is

ORDERED, by the Court, that Pacific Legal Foundation's motion to participate as amicus curiae is granted, and the Clerk is directed to file its lodged memorandum, and it is

FURTHER ORDERED, by the Court, that appellants' motion for injunction pending appeal is denied.

This Court agrees with the District Court's determination that questions concerning the proper interpretation and application of the equal time provision of the Communications Act of 1934, 47 U.S.C. § 315(a), are within the primary jurisdiction of the Federal Communications Commission. Appellants' complaint, which raises just such issues, should have been presented to the Commission in the first instance.

The Court cannot accept appellants' contention that the doctrine of primary jurisdiction is inapplicable because the Commission lacks the statutory authority to provide prospective coercive relief. Appellants have not demonstrated that the Commission's power to grant prospective declaratory relief could not adequately protect the asserted right to participate in the impending debates. A preference for declaratory relief from the Commission rather than injunctive relief from the District Court is particularly appropriate in this case. An injunction restraining the broadcast of the presidential debates would raise serious First Amendment problems. Prior restraints are disfavored generally, and a prior restraint of speech of a purely political nature is even more suspect.

EXH. B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1865 — September Term, 19 76

When, as in this case, there exists an administrative remedy less drastic than a court-ordered injunction and the disputed questions are within the agency's special competence, the application of doctrine of primary jurisdiction is entirely appropriate.

Per Curiam

CWS
BR

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 76-924

In re Complaints of)
)
The American Independent Party)
)
against)
)
American Broadcasting Companies, Inc.)
)
and)
)
CBS, Inc.)
)
and)
)
National Broadcasting Company, Inc.)
)
and)
)
Eugene McCarthy)
)
against)
)
American Broadcasting Companies, Inc.)
)
and)
)
CBS, Inc.)
)
and)
)
National Broadcasting Company, Inc.)
)
and)
)
Public Broadcasting Service)

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1976 ;Released: October 5, 1976

By the Commission: Commissioner Lee concurring; Commissioner Hooks dissenting;*/Commissioners Fogarty and White not participating.

1. The Commission has under consideration a complaint and an Application for Review of the Broadcast Bureau's September 17, 1976 ruling (__ FCC 2d __ (72346; C9-426)), filed on September 24, 1976 by the American Independent Party (AIP) on behalf of its Presidential candidate,

*/Statement to be issued at a later date.

EXH. C

Lester Maddox 1/; a complaint filed by independent Presidential candidate Eugene McCarthy on September 24, 1976; and oppositions to the AIP and McCarthy complaints filed by the American Broadcasting Co. (ABC), the National Broadcasting Co. (NBC), and the Public Broadcasting Service (PBS) on September 30, 1976, by CBS, Inc. (CBS) on October 1, 1976; and a reply to the opposition filed October 1, 1976 by AIP. 2/

2. In his initial complaint in this case Maddox had requested that the Commission order broadcasters not to broadcast debates between Republican Presidential candidate Gerald Ford and Democratic Presidential candidate Jimmy Carter unless Maddox was allowed to participate, or, if he were not allowed to participate, that the Commission order the broadcasters to give him "equal time without cost."

3. In its September 17, 1976 ruling the Broadcast Bureau, in accordance with its delegated authority, stated that the Commission is "prohibited by the First Amendment to the Constitution and Section 326 of the Communications Act from censoring broadcast matter" and therefore "cannot order any licensee or network not to broadcast a debate between the Democratic or Republican Presidential candidates, or any other program." The Bureau further stated that under the Commission's ruling in Aspen Institute, 55 FCC 2d 697 (1975), affirmed sub. nom. Chisholm et al. v. FCC, ___ F2d ___ (No. 75-1951, April 12, 1976), "where a debate between two candidates is arranged by an independent party not associated with any candidate or broadcaster and is broadcast...in its entirety, the broadcast of such debate is 'on-the-spot coverage of a bona fide news event' within the meaning of the exemption contained in Section 315(a)(4), and would thus not be subject to equal opportunities"; that Maddox had not provided any specific information to support his claim that the Ford/Carter debates did not satisfy the Aspen Institute criteria to come within the exemption; and that Maddox was therefore not entitled to equal opportunities.

1/ The AIP Application for Review contains both a request for review of the Broadcast Bureau's rejection of Maddox's equal opportunities complaint and a new complaint concerning the application of the fairness doctrine to candidate appearances not subject to equal opportunities. Section 5(d)(5) of the Communications Act provides in pertinent part that no Application for Review "shall rely on questions of fact or law upon which the . . . [designated authority] has been afforded no opportunity to pass." Therefore the Application for Review must be dismissed. However, we will handle the AIP pleading as an initial complaint, to be considered in conjunction with a review of the Broadcast Bureau's ruling on our own motion pursuant to Section 1.117 of our rules.

2/ The Commission has received extensive pleadings totaling 255 pages. Therefore only the major relevant facts and arguments are summarized here. However, all facts and arguments were considered by the Commission in making this decision.

4. In seeking review of the Bureau's ruling AIP states that under the Aspen Institute ruling, in order to come within the 315(a)(4) exemption, a debate "must be under the exclusive arrangement and control of an independent party not associated with either the opposing candidates or broadcasters," must be broadcast in its entirety, and must "not be 'designed [by broadcasters] to promote the interests of the candidate'"; that because of the "extraordinary nature" of the Ford/Carter debates, a refusal by broadcasters to "provide substantial coverage" to other "significant candidates" would have "the reasonable effect, and therefore design, of promoting only the interests of the covered candidates"; that there was "substantial evidence" to show that the debates were not organized by the League of Women Voters, but were instead organized by the Public Broadcasting Service; that the candidates themselves exercised control over certain material aspects of the debate arrangements, including selection of interviewers and format, and therefore the networks could not "exercise full journalistic discretion" in covering the debates; that the debates are actually "'panel discussions' not covered by the exemption"; that the debate which occurred on September 23, 1976 came to a "temporary halt for 28 minutes" when the television audio coverage was lost, thus showing that "the League and the networks were not acting separately as sponsor and broadcaster in presenting and covering the event"; that, if the debates should come within the 315(a)(4) exemption, the "networks' responses to Maddox largely ignored their 'backup' Fairness Doctrine obligations to cover his candidacy by providing a reasonable amount of broadcast time to the coverage of contrasting viewpoints as to who should be elected President"; that, "based on actual viewing experience," Maddox had received "some coverage" on all three networks but that coverage was "manifestly inadequate in absolute terms and vastly disproportionate in quantity and quality"; that Maddox is a "significant candidate" because he is on the ballot in 30 states and has a "numerical ability" to be elected; and that the Commission should therefore rule that under the fairness doctrine the networks devote "substantial amounts" of coverage to "significant independent Presidential and Vice Presidential candidates."

5. In his complaint Eugene McCarthy states that the Commission's ruling in Aspen Institute held that "broadcasters may carry presidential debates involving 'major' or 'serious' candidates, free of equal time or fairness restrictions, subject to certain conditions"; that those "conditions have been broken," resulting in "both an equal time and a fairness doctrine violation"; that he is a "'major' or 'serious' candidate because he has "measurable support" and a "mathematical chance" of being elected; and that the Commission should rule that "the exclusion of any 'major' or 'serious' candidate from any future presidential debate," takes the debate outside the "on-the-spot coverage of a bona fide news event" as defined in Aspen Institute.

6. In its responses to both the Maddox and McCarthy complaints, ABC states that the debates were sponsored and organized "solely by the League of Women Voters"; that it had not participated in or exercised any control

over the establishment of the format or selection of interviewers for the debate, nor did it have any control over the temporary halt of the September 23 debate during the audio failure; that the audio failure affected both the television transmission and the public address system in the hall where the debates took place and under such circumstances a "halt of the proceedings" would not affect the "exempt status" of the event; that there is no support for the claim that Aspen Institute requires that all "'major' or 'serious' candidates" be included in a debate for the debate to be exempt; that, with reference to the fairness doctrine aspect of the complaints, the Commission may not order a broadcaster to cover a particular candidate in a particular format; that ABC had given news coverage to Maddox and McCarthy; and that ABC's news coverage of the Presidential candidates is "based on the exercise of good faith news judgments."

7. In its responses to these complaints, NBC states that its coverage of the debates is exempt from equal opportunities obligations as "on-the-spot coverage of a bona fide news event" under Aspen Institute; that NBC is broadcasting the debates not for the purpose of "advanc[ing] a particular candidacy but in the exercise of its 'reasonable news judgment'";that NBC exercised no control over the organization, format, or interviewers for the debates or the temporary 28-minute halt due to audio failure; that the news coverage afforded to Maddox and McCarthy by NBC is based on its "independent editorial judgments as to the interest of the public in the various candidates"; and that NBC has provided "substantial coverage" to both the Maddox and McCarthy candidacies and neither complainant has provided sufficient information to show that NBC was unreasonable in determining that the candidacies of McCarthy and Maddox are not sufficiently significant to warrant more coverage under the fairness doctrine than that given or planned by NBC.

8. In its response to these complaints CBS states that its coverage of the debates is exempt from equal opportunities obligations as "on-the-spot coverage of a bona fide news event" under Aspen Institute; that the "decisive" factors in determining whether an event is exempt as "on-the-spot coverage of a bona fide news event" are "whether the broadcaster's decision to cover the debate is based on its good faith determination as to the event's newsworthiness" and whether the broadcaster (and not the candidate) exercised any "control" over the debate; that CBS broadcast the debate because of its obvious newsworthiness, and not for the purpose of promoting the interests of any candidate; that CBS did not exercise any control over the organization or format of the debate or the 28-minute halt due to audio failure; that in fulfilling its fairness doctrine obligations with regard to news coverage of candidates, " a broadcaster is only required to make reasonable judgments in good faith as to the significance of a particular candidate and so decide how much time should be devoted to coverage of his campaign activities," (quoting from U.S. Labor Party, 57 FCC 2d 1273 (1976)); and that CBS' news coverage of Maddox and McCarthy "is fully consistent with its obligations under

the fairness doctrine," and neither has submitted any specific information to show that CBS'news judgments are unreasonable.

9. In its response to McCarthy's complaint PBS states that the debates are exempt from equal opportunities under Aspen Institute; that it did not exercise any "role in the establishment or structuring of the debates" nor any control over the temporary 28-minute halt in the debate due to the audio failure; that Aspen Institute did not hold that all "major" candidates had to participate for a debate to qualify for the exemption; that PBS "exercise[d] its good faith news judgment that the debates were newsworthy events and should be covered"; and that, in view of PBS' coverage of McCarthy's candidacy there was no violation of the fairness doctrine.

DISCUSSION

10. The "equal opportunities" provision of Section 315 was originally intended by Congress "to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station licensee in selling or donating time or in scheduling political broadcast[s]." S. Rep. 562, 86th Cong., 1st Sess., July 22, 1959, pp. 8-9. However, as a result of the 1959 "Lar Daly" case, in which the Commission ruled that the equal time provision was applicable even to an appearance by a candidate on a regularly scheduled newscast, Congress stated that a "rigid interpretation of equal opportunity under Section 315" to news-type programs would "constitute a deterrent to stations permitting the use of their facilities by legally qualified candidates" because stations would be "reluctant to show one political candidate in any news-type program lest he assumes the burden of presenting a parade of aspirants." Id. at 9. Congress stated that

> [a]n informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of a campaign. The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters. Id. at 10.

Thus, Congress enacted the "bona fide news" exemptions in order to accomplish two objectives:

> First, the right of the public to be informed through broadcasts of political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events. Hearings on Political Broadcasts-Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., 1959, p. 2 (comments of Chairman Harris).

11. In Aspen Institute the Commission sought to effectuate the Congressional objectives of promoting "the right of the public to be informed through broadcasts of political events" and allowing broadcasters "discretion...to be selective with respect to the broadcasting of such events" by overruling two prior cases, The Goodwill Station, Inc., 40 FCC 362 (1962); National Broadcasting Co., 40 FCC 370 (1962), so that the broadcast of debates between candidates would be considered as "on-the-spot coverage of a bona fide news event" exempt from equal opportunities requirements "under the circumstances covered by" the 1962 cases cited above, i.e., where the debates were arranged by a party not associated with the broadcaster; where the debates are broadcast live and in their entirety; and where the broadcaster determines to cover the debates based on his reasonable, good faith journalistic judgment of the newsworthiness of the event and not for the purpose of serving the political interest of one of the candidates. 3/

12. In enacting the "bona fide news" exemptions, Congress also recognized that "[i]t is difficult to define with precision what is...on-the-spot coverage of a bona fide news event" and therefore "carefully gave the Federal Communications Commission full flexibility and discretion to examine the facts in each complaint" in order to "determine on the facts submitted in each case whether...on-the-spot coverage of a news event...is bona fide or a 'use' of the facilities requiring equal opportunity." S. Rep. 562, supra at 12. Consequently, while Aspen Institute establishes certain criteria which, when satisfied, bring a debate between candidates within the "on-the-spot coverage of a bona fide news event" exemption, when presented with a factual situation different from that in Aspen the Commission need not rely on a rigid application of that decision, but instead has a responsibility to consider the new facts and render a decision consistent with the Congressional intent. Thus, in Delaware Broadcasting Company, (WILM), ___ FCC 2d ___ (FCC 76-873, September 21, 1976), the Commission re-examined the Aspen requirement which was based on the circumstances of the Goodwill and NBC cases, that a debate be broadcast live, and concluded that a delay of no more than one day in the broadcast of a debate "does not necessarily remove the Section 315 exemption from that broadcast."

13. AIP characterizes the Aspen ruling as requiring that a debate "must be under the exclusive arrangement and control of an independent party not associated with either the opposing candidates or broadcasters," and asserts that, since Ford and Carter did exercise control over certain material aspects of the debate arrangements, including selection of interviewers and format, the debates did not come within Aspen and were

3/ It should be noted here that the Aspen ruling did not establish any requirement that all so-called "'major' or 'serious' candidates" participate in a debate for that debate to come within the exemption.

therefore not exempt. The initial question for determination here is whether the exercise of such control by the debating candidates would take the debate outside the "on-the-spot coverage of a bona fide news event" exemption and make it subject to equal opportunities. We believe that the legislative history of the bona fide news exemption makes it clear that such candidate input into the debate arrangements would not remove the debate from the 315(a)(4) exemption. The United States Court of Appeals for the District of Columbia, in affirming the Commission's ruling in Aspen, expressly approved this view. As the above quotations from the legislative history of the exemptions indicates, in enacting those exemptions Congress was concerned with and focused on the role of the broadcaster in exercising journalistic discretion presenting news on political news as opposed to "serv[ing] the political advantage" of a candidate. Section 315 was originally enacted to prevent "favoritism of a station in selling or donating time or in scheduling political broadcast[s]." (Emphasis added) S. Rep. 562, supra at 8-9. One of Congress' expressed goals in enacting the exemptions was to afford discretion to broadcasters in the selection of political news events to be covered (Hearings on Political Broadcasts-Equal Time, supra), in spite of the possibility of "favoritism that may be shown by some partisan broadcasters." (Emphasis added) S. Rep. 562, supra at 10. In discussing the specific inclusion of "political conventions and activities incidental thereto" in the "on-the-spot coverage of a bona fide news event" exemption, the United States Court of Appeals for the District of Columbia stated:

> We remain unconvinced by petitioners' arguments that these events [political conventions, debates and press conferences] are distinguishable based on the degree of control by the candidate, or the degree to which candidates tailor such events to serve their own political advantages. It is more reasonable to believe, as the Commission apparently does, that any appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his own political ends. There is ample support in the legislative history for the Commission's conclusion that a candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315(a)(4). (Emphasis added). Chisholm et al. v. FCC, supra, sl. op. at 20-21.

Moreover, the Aspen Institute ruling made no reference to candidate participation in the arrangement of a debate. Although Aspen specifically stated that in the Goodwill case "[n]either [candidate] had any part in establishing the format for the debate," in the NBC case a letter in the Commission's files dated September 24, 1962 from UPI to CBS stated that the debating candidates and UPI had made an agreement concerning their appearances. As a practical matter it is unreasonable to assume that any candidate would agree to a debate without any input into the arrangements for the debate, such as date, duration, method of questioning,

participants and subject matter, nor would such input destroy the newsworthiness of political candidates appearing before the public face-to-face to present their positions on the issues. Therefore, the fact that Ford and Carter had some say in the arrangements does not remove the instant debates from the 315(a)(4) exemption.

14. Thus the critical factor in determining whether a debate comes within the 315(a)(4) exemption is the role and the intent of the broadcaster in covering it. As indicated above, the broadcaster must determine to cover a debate based on its reasonable, good faith independent journalistic judgment as to the newsworthiness of the event and not for the purpose of "serv[ing] the political advantage of a candidate." We adhere to the position taken in Aspen that involvement of a broadcaster in the arrangement of a debate would raise questions as to whether the broadcast of that debate would come within the news exemption. AIP argues that there is "substantial evidence" that the debates were not organized by the League of Women Voters but instead were arranged by the Public Broadcasting Service. However the only "evidence" submitted to support this contention was an excerpt from a Newsweek magazine article dated September 27, 1976, which stated, in pertinent part, that the League "first got the idea of Presidential debates from public broadcasting producer Jim Karayn." AIP did not submit any information to show any official connection between Karayn and the Public Broadcasting Service, or to show that Karayn or any other person acted on behalf of the Public Broadcasting Service in actually arranging the debates. In fact, Karayn is not now and never has been employed by the Public Broadcasting Service. He formerly was employed by public television station WNET, New York, New York and WETA, Washington, D. C., but has not been employed by a television station since August 1975. Thus it does not appear that any broadcaster participated in the debate arrangements in such a manner as to take the debates out of the 315(a)(4) exemption.

15. Both complainants argue that the temporary 28-minute halt to the debate because of the loss of television audio coverage showed that "the League and the networks were not acting separately as sponsor and broadcasters in presenting and covering the event." This argument fails for two reasons. First, the microphones and speaker system in the hall where the debate was taking place were connected to the same pickup as the audio portion of the broadcast. Thus, when the audio portion of the broadcast halted, the sound system in the hall failed also. The fact that the candidates waited for the technical problems to be resolved so that both the television viewers and the live audience could hear them does not remove the debate from the 315(a)(4) exemption. Second, as indicated above, the Commission must look to the role and the intent of the broadcaster in covering the event, since it is control of the debate by the broadcaster that would remove the debate from the 315(a)(4) exemption. However, when the audio portion of the broadcast was lost, no broadcaster is shown to have exercised any control over the continuation or suspension of the debate or requested or required the candidates to

halt. The candidates themselves determined to wait for re-establishment of the audio portion of the transmission. Also, in a letter attached to the PBS pleading herein, the League stated that it attempted unsuccessfully to obtain use of the sound systems in the theatre so that the debate could continue without regard to the broadcast coverage. It cannot be said that under the foregoing circumstances the debate did not come within the 315(a)(4) exemption.

16. AIP also argues that the debates are in fact "panel discussions" and are therefore not covered by the exemption. However AIP does not submit any information to justify its distinction between a "debate" and a "panel discussion" or to show that the event under consideration here is a "panel discussion" ineligible for the 315(a)(4) exemption. Webster's Dictionary defines "debate" as "contention by words or arguments: as a: the formal discussion of a motion before a deliberative body according to the rules of parliamentary procedure [or] b: a regulated discussion of a proposition between two matched sides." Where there is such "contention by words or arguments" in a "regulated discussion" between two candidates, the event is clearly the type of event which will contribute to "the continuance of an alert and knowledgeable democratic society" as intended by Congress. S. Rep. 562, supra at 10. In the absence of a showing by AIP, considerably stronger than it has presented, that the Ford/Carter debates should not be considered "debates" within the 315(a)(4) exemption, it would be inappropriate and in violation of the intent of Congress for the Commission to attempt to establish or sanction a particular qualifying format or structure as a "debate" to the exclusion of all other face-to-face confrontations between candidates.

17. In view of the above we cannot find that the networks were unreasonable in determining that the broadcast of the Ford/Carter debate was "on-the-spot coverage of a bona fide news event" exempt from equal opportunities. 4/

18. We now turn to the allegations of McCarthy and AIP that the networks have violated the fairness doctrine by the broadcast of the debates in question. The fairness doctrine provides that if a broadcaster presents a discussion of one side of a controversial issue of public importance it must afford a reasonable opportunity for the presentation of contrasting points of view in its overall programming. 5/

4/Even if the debates were subject to equal opportunities, the complainants would not be entitled to be included in future debates. Socialist Workers 1970 Campaign Committee, 26 FCC 2d 38 (1970). The Commission could not compel the League of Women Voters to invite a particular candidate to participate in a debate, nor could it require any candidate to appear to debate another candidate.

5/We would also emphasize that the broadcast of the debate in and of itself does not create separate fairness obligations on the part of a broadcaster independent of other programming which it might present. The Commission has often stated that it is the overall programming of the broadcaster which the Commission will review, not a particular program or series of programs. Fairness Report, 48 FCC 2d 1, 52.

There is no obligation under the fairness doctrine that "equal time" be afforded each side as would be the case where a candidate appears on a program subject to the "equal opportunities" requirement of Section 315 of the Communications Act. Rather, the broadcaster has the discretion to determine how best to present the contrasting viewpoints on the issue; thus, it may make determinations as to the significance of contrasting viewpoints and decide which forum and format would be the most appropriate for the presentation of these views. The decisions of the broadcaster in these matters are subject to review by the Commission to determine whether they were made in good faith and are reasonable in light of all the facts presented. 6/

19. In an election for public office each candidate cannot be considered a separate controversial issue of public importance merely by reason of his or her candidacy or partisan campaign. Rather, the issue presented to the voters is who, among all the candidates, should be elected; the individual candidates represent contrasting viewpoints on that issue. Hence, under the fairness doctrine a broadcaster is required only to make a reasonable good faith judgment as to the significance of a particular candidate and decide how much broadcast coverage should be devoted to his candidacy and campaign activities. U.S. Labor Party, supra; Robert L. Miller, ___ FCC 2d ___, Mimeo No. 68436 (Broadcast Bureau, July 27, 1976). 7/

20. The purpose of the fairness doctrine is to promote uninhibited, wide-open debate on the issues of importance to the listening and viewing public. As applied to the coverage of political campaigns, it is designed to insure that the public is aware of the significant candidates and issues involved in the election. In order to promote this discussion of issues, the Commission must be able to assure the broadcaster that his decisions as to the significance of particular candidates and the amount of coverage to be devoted to the campaigns of the candidates will not be disturbed absent a prima facie showing by a complainant that these decisions were unreasonable or were made in bad faith. We do not believe that either of the complainants here have made such a showing.

21. We also note that neither of the candidates has alleged that he contacted the networks before bringing his fairness doctrine complaint to the Commission. Such an allegation is one of the basic procedural

6/This standard of review is to be distinguished from that which the Commission applies to complaints alleging "slanting or staging" of news. In those cases, as NBC notes, the Commission will not take action absent extrinsic evidence of deliberate distortion on the part of the licensee. The Commission has stated that in these situations it will not substitute its news judgment for that of the licensee. However, in fairness doctrine complaints, the Commission will, and indeed must review the news programming of the licensee, not to determine whether it is true or correct, but rather to discover whether contrasting viewpoints on an issue have been covered in the overall programming and whether that coverage was reasonable and in good faith.

7/(See next page for footnote)

requirements of the fairness doctrine (See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 F.R. 145 (1964)) and is essential to a showing by the candidate of a licensee's unwillingness to afford his campaign reasonable coverage. The Commission does not feel that it is appropriate to interfere in matters such as these before the broadcaster has had an opportunity to accommodate the wishes of the candidate through negotiations directly with him. In addition, the complainants have not demonstrated that the networks' coverage of their campaigns has been unreasonable. The networks contend that neither McCarthy nor Maddox represent significant viewpoints on the issue of who should be elected president. In his complaint McCarthy alleges that national polls show that he can anticipate only 10% of the vote of the general population. 8/ The AIP states that Maddox is "unlikely to win the election." In light of these facts we cannot find that the networks were unreasonable in their decisions. Moreover, each is able to cite instances of coverage of both McCarthy and Maddox in its news programming. 9/ Again, complainants have furnished no information which would indicate that this coverage is inadequate or unreasonable. In view of the foregoing, we are unable to find that there has been any violation of the fairness doctrine by NBC, CBS, ABC or PBS in their coverage of the campaigns of either McCarthy or Maddox.

7/Contrary to the statement made by McCarthy in his complaint, the obligation under the fairness doctrine with respect to the broadcast of debates is not obviated by a finding by this Commission that the debates are exempt from the equal opportunities provision of Section 315. The Commission recently noted, through its Broadcast Bureau, that the fairness doctrine applies to all programming of the licensee except that which is subject to the equal opportunities provision of Section 315. Gloria Sage, ___ FCC 2d ___, Mimeo No. 71573 (Broadcast Bureau, August 30, 1976).

8/See McCarthy complaint, appendix page 5; Opposition of NBC to McCarthy Complaint, p. 35.

9/With respect to coverage of McCarthy see Opposition of NBC, Inc. to McCarthy Complaint, p. 29-31; CBS Opposition to Complaints p. 18-19; ABC letter concerning McCarthy complaint, p.7, Response of PBS to McCarthy complaint p.9. With respect to the coverage of Maddox see ABC's Opposition to Application for Review p. 16; Opposition of NBC Request for Relief, p. 21; CBS Opposition to complaints, p. 18-19. Also, see f.n. 10, infra.

22. In view of the foregoing, AIP's Application for Review IS DISMISSED (See f.n. 1, supra); the Broadcast Bureau's September 17, 1976 ruling IS AFFIRMED; and the above described complaints ARE DENIED. 10/

BY DIRECTION OF THE COMMISSION

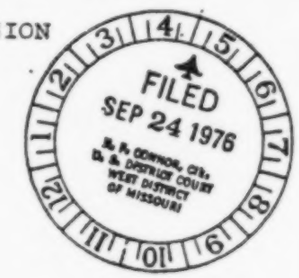
Vincent J. Mullins
Secretary

10/Filed on October 4, 1976 were two additional pleadings. CBS stated that Maddox and McCarthy appeared on adjacent Face the Nation programs on October 3, 1976.

AIP, in reply to the networks,states, inter alia, that the theatre where the debates were held (Walnut Street Theatre) "was designed and constructed so that theatregoers would be able to hear the...players without the use of microphones which were not even in existence when the theatre was first constructed." AIP asserts that the networks and the League fail "to explain away this fact" and that the "common sense conclusion is that the debates could have gone on without TV coverage." We believe this argument is irrelevant. This Commission would not second-guess the decision of the candidates or the League to delay the debate until the theatre public address system was working. Moreover, as indicated above, there is no evidence that the networks had any control over this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT

OF MISSOURI, CENTRAL DIVISION



EUGENE J. McCARTHY, et al.,)
)
Plaintiffs,)
)
vs.) No. 76 CV-162-C
)
JAMES C. KIRKPATRICK,)
Secretary of State of Missouri,)
)
Defendant.)

FINDINGS AND OPINION

Plaintiff Eugene J. McCarthy, an announced, independent candidate for President of the United States in the election to be held on November 2, 1976, is attempting to appear on the ballot in Missouri as an independent unaffiliated candidate.[1] Plaintiffs Gregory J. Mancuso and Kenneth W. Paul are registered, qualified voters and residents of the State of Missouri who seek to have their names placed on file as presidential electors for plaintiff McCarthy in the November general election. Plaintiffs Travis A. Rogers and Jennifer H. Harned are registered, qualified voters of Missouri who have actively supported the candidacy of plaintiff McCarthy by circulating nominating petitions for his candidacy and who

[1]Plaintiff McCarthy is making similar attempts in all 50 states. By September 1, 1976, according to counsel for plaintiffs, he had complied with petition requirements in 12 states.

Exh. D

wish to vote for him for President of the United States in the November general election. Defendant James C. Kirkpatrick is the duly elected Secretary of State of the State of Missouri whose duties include verifying nominating petitions of independent candidates and certifying the names of candidates for inclusion on the general election ballot to be submitted to the voters on November 2, 1976.

The Missouri statutes create three methods for nomination of candidates for President of the United States to appear on the ballot at the November general election. An "established political party," which polled for its candidate for governor more than two per cent of the entire vote cast for governor in the state at the last general election, §120.140.2, R.S. Mo. Supp. 1975, may nominate its candidate, whose name shall be placed upon ballots as provided by law. §120.150, R.S. Mo. Supp. 1975. The statutes make no apparent limitation upon the time by which established parties must certify their candidates for President to the Secretary of State, so long as adequate time remains for preparation and circulation of ballots.[1]

Candidates of political parties whose candidate for governor did not receive more than two per cent of the votes

[1]Established party candidates for most other offices in Missouri are nominated by primary election. §120.300, R.S. Mo. Supp. 1975. Party primaries are held on the first Tuesday after the first Monday in August. §120.310, R.S. Mo. Supp. 1975. In 1976, the primary election was held on August 3. Petitions are not required of persons desiring to appear on the ballot in party primaries; rather, a candidate must file a verified "written declaration of candidacy," §120.340.1, R.S. Mo. Supp. 1975, by the last Tuesday in April preceding the primary election.

cast for governor at the last general election may appear on the ballot as candidates of a new political party by gathering signatures on nominating petitions. §120.160, R.S. Mo. Supp. 1975. The new party must submit its nominating petitions no later than July 31 preceding the general election. The petitions must be signed by a number of registered voters in each of the state's congressional districts which is equal to at least 1% of the total number of votes cast in the district for governor at the last gubernatorial election, or by a number of qualified voters in each of one-half of the congressional districts which is equal to at least 2% of the total number of votes cast in those districts for governor at the last gubernatorial election. §120.160.3 and .6, R.S. Mo. Supp. 1975.

Independent candidates may be nominated by filing a nominating petition which complies with substantially the same requirements applied to a new political party. However, the independent candidate must submit his nominating petition on or before the last Tuesday in April preceding the general election, the same date fixed for filing a declaration of candidacy in a party primary. §120.240.1 and §120.340.1, R.S. Mo. Supp. 1975. In 1976, the filing deadline in Missouri was 188 days before the general election.[1]

---

[1]Defendant Kirkpatrick contends that independent candidates also may qualify for the ballot in Missouri by filing a declaration of candidacy, as do party candidates, and participating in a primary election for independent candidates. This position is not clearly supported by the statute, however, and the facts indicate that not even the Secretary of State on April 27, 1976, believed this alternate avenue to be available. See § 120.180, R.S.Mo. 1969.

While the Missouri statutes provide for the nomination of independent candidates for President of the United States, the statutes contain no provision specifically permitting the name of the independent candidate for President to appear on the ballot. See §111.351, R.S. Mo. Supp. 1975. The statute provides that a vote for a candidate of a political party shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the Secretary of State. §111.351.2, R.S. Mo. Supp. 1975. No corresponding provision is made concerning the electors of independent candidates.

The facts which give rise to this litigation, and to which the parties have stipulated, are as follows:

On February 23, 1976, the McCarthy campaign was notified by letter from Eula Huss, Chief Clerk, Office of the Missouri Secretary of State, that a nominating petition for an independent candidate for President of the United States must be submitted no later than 5:00 p.m. on July 31, 1976. On July 27, 1976, the Attorney General of Missouri issued an Opinion Letter stating that the filing deadline for independent candidates' nominating petitions was April 27, 1976, and statewide news media thereafter reported the Attorney General's interpretation of the state's election law.

On July 31, 1976, representatives of plaintiff McCarthy submitted to defendant Kirkpatrick a nominating petition which purported to nominate plaintiff McCarthy as an independent candidate for President of the United States at the November 2, 1976, general election, and plaintiffs Mancuso and Paul, among

others, as electors for plaintiff McCarthy at the general election. Defendant Kirkpatrick refused to take possession of the proffered petition, to verify the signatures thereon, or in any other manner to commence to certify the candidacy of the persons named on the petition, basing his refusal upon the Attorney General's Opinion of July 27, 1976. Defendant Kirkpatrick further advised plaintiff McCarthy, in reliance upon the opinion of the Attorney General of Missouri, that the Missouri election laws make no provision for placing the names of independent candidates for President of the United States upon the general election ballot so that a vote for the independent candidate would stand, as it does for party candidates, as a vote for his presidential electors.

After the July 31 tender and refusal to accept plaintiffs' nominating petition, fifty-five petition pages containing signatures purportedly from the 5th Congressional District were notarized on August 1, August 4, August 23, or August 26, 1976. Six petition pages from the 8th Congressional District were notarized on August 26, 1976.

History of This Litigation

Following commencement of this action on August 16, 1976, and pending the evidentiary hearing which subsequently was held on September 10, 1976, this Court entered its Order on August 26, 1976, directing that plaintiffs deliver forthwith to defendant Kirkpatrick the nominating petitions tendered on July 31 and such additional nominating petitions as had been obtained since that date. Defendant Kirkpatrick was directed by the Court's Order to determine at the earliest possible time whether the petitions had been signed by the number of

qualified voters required by § 120.180, R.S.Mo. (1969), and whether the signatures complied with the requirements of § 120.190, R.S.Mo. Supp. 1975, without such action in any manner prejudicing any defense to the allegations of plaintiffs' complaint. Pursuant to the Court's Order, all petitions obtained by that date were delivered to and accepted by the Secretary of State on August 26, 1976.

A full evidentiary hearing in this cause was held on Friday, September 10, 1976, in Jefferson City, Missouri, at which the Court received in evidence Defendant's Report on Results of Signature Verification Pursuant to Order of August 26, 1976, the parties' Stipulation of Agreed Facts, and an additional letter offered by counsel for plaintiffs. Neither counsel for plaintiffs nor counsel for defendant desired to present further evidence to the Court, and argument was directed to the effect of Defendant's Report on Results of Signature Verification, which stated that in three of the five congressional districts for which plaintiffs submitted signatures, there were an inadequate number of signatures of qualified voters submitted. Plaintiffs' counsel presented a formal request that plaintiffs be allowed until Monday, September 13, 1976, to obtain additional signatures and that the Secretary of State be ordered to receive and check additional signatures received by that date.

Following consideration of the evidence and briefs of the parties, the Court concluded that plaintiffs' request for further order of the Secretary of State should be denied, and pursuant to the request of plaintiffs' counsel that the Court treat the application for additional time as a request for preliminary injunction, denial of which could be the basis for seeking immediate appellate review, the Court entered its

Memorandum and Order dated September 10, 1976. In denying any request for preliminary injunction or other relief against defendant at that time, the Court found that plaintiffs failed to present qualified signatures sufficient to comply with the requirements of § 120.180, R.S.Mo. (1969), by failing to tender for filing with the Secretary of State of Missouri on August 26, 1976, sufficient signatures to qualify for ballot position at the general election. With regard to plaintiffs' contention that the issuance of the Attorney General's Opinion Letter on July 27, 1976, inhibited the gathering of signatures between that date and July 31, 1976, when the petitions were tendered to defendant Kirkpatrick, the Court found that plaintiffs had failed to demonstrate a particularized injury to the petition campaign and that any injury which might have resulted was more than offset by the four days in August during which plaintiffs collected additional signatures which were submitted to the Secretary of State on August 26, 1976, and were considered by him in making his Report to this Court.[1]

The Court further found that § 120.180, which establishes the number of signatures required to qualify for ballot position at the November general election, and which is not challenged by plaintiffs in this action, is a valid expression of the state's interest in protecting the

[1]Plaintiffs' Application for Injunction Pending Appeal was presented, considered, and denied by this Court on September 10, 1976. On September 13, 1976, the Eighth Circuit Court of Appeals heard, considered, and denied summarily plaintiffs' interlocutory appeal from this Court's Memorandum and Order of September 10, 1976. Plaintiffs' appeal to Justice Blackmun, sitting as Circuit Justice, was denied on September 16, 1976.

integrity of the ballot. Plaintiffs thus found themselves barred from the ballot by a valid provision of the laws while attempting to gain ballot access through challenging the validity of a separate provision. Because § 120.180 represented an absolute bar to plaintiff McCarthy's candidacy in Missouri, this Court found on September 15, 1976, that plaintiffs lacked standing to maintain this action. Storer v. Brown, 415 U.S. 724, 737 (1974). Accordingly, the Court ordered that plaintiffs' requests for declaratory and injunctive relief herein be denied and the cause dismissed without a determination of the merits of plaintiffs claims.[1]

Following the order of dismissal entered on September 15, 1976, plaintiffs and a dedicated group of their campaign workers began a systematic re-check of the signatures on nominating petitions which had been invalidated by the Secretary of State in the verification process which preceded preparation of his report to this Court. With the cooperation of the Secretary of State and his staff, as well as the First Assistant Attorney General of the State of Missouri who argued this cause for defendant Kirkpatrick,

[1]Even in declining to determine the merits of plaintiffs' claims, however, the Court felt compelled to comment upon the very substantial question which existed as to the constitutionality of §§ 120.240.1 and 111.351, R.S.Mo. Supp. 1975, and to suggest that the issues raised herein merit the serious consideration of the Missouri General Assembly in its next legislative session.

this re-check of the nominating petitions was completed by 4:00 p.m. on Tuesday, September 21, 1976, the time by which the Secretary of State was required to certify to local election boards the names of candidates for President of the United States to appear on the ballot at the November 2, 1976, general election.[1] As a result of the plaintiffs' search, sufficient previously-invalidated signatures were "retrieved" by 4:00 p.m. on September 21, 1976, to enable the Secretary of State to agree that plaintiffs had submitted signatures sufficient in number to comply with the requirements of § 120.180, R.S.Mo. 1969. Contending that they had remedied the defect which previously denied them standing, plaintiffs then moved the Court for a rehearing of their challenge to §§ 120.240.1 and 111.351, R.S.Mo. Supp. 1976, or in the alternative, for a new trial.

At the hearing held September 21, 1976, on plaintiffs' motion for rehearing or new trial, counsel for defendant Kirkpatrick stipulated on the record that the Report on Signature Verification filed September 10, 1976, was erroneous, and that plaintiffs had achieved the required number of verified signatures to comply with § 120.180, R.S.Mo. 1969.[2] The stipulation was accepted in evidence, and

[1]The Secretary of State, to cooperate with plaintiffs' verification process, had twice postponed his certification to the effect that further delay would risk delay in printing of ballots and possible disenfranchisement of absentee voters who must cast their ballots in advance of the general election. See § 112.020, R.S.Mo. Supp. 1975.

[2]As reported in open court by counsel for defendant, the accurate verification of plaintiffs' nominating petitions resulted in the following figures:

	No. Required	No. Obtained	Surplus
1st Cong. Dist.	2,979	3,178	199
2nd Cong. Dist.	4,267	4,304	37
3rd Cong. Dist.	3,651	3,688	37
5th Cong. Dist.	3,064	3,094	30
8th Cong. Dist.	3,707	3,756	49

the Court found that based upon defendant's stipulation, plaintiffs did possess standing to bring their constitutional challenge to Missouri's election law. Plaintiffs' Motion for Rehearing accordingly was sustained, and upon consideration of the record made in the hearing in this cause held in Jefferson City, Missouri, on September 10, 1976, as well as the pleadings and briefs filed by the parties, the Court held that § 120.240.1, R.S.Mo. Supp. 1975, violates the First and Fourteenth Amendments to the United States Constitution, and that § 111.351, R.S. Mo. Supp. 1975, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Court therefore ordered that the Secretary of State certify the name of Eugene J. McCarthy to appear on the official ballot of the State of Missouri at the November general election and that a vote for plaintiff McCarthy shall be counted as a vote for the electors designated in his nominating petition. This Opinion is entered pursuant to the above-stated findings and order delivered orally in open court on September 21, 1976.

The Arguments

Plaintiffs' complaint herein contends that § 120.240.1, R.S.Mo. Supp. 1975, violates plaintiffs' rights under the First and Fourteenth Amendments to the Constitution of the United States because by requiring independent candidates to circulate and submit nominating petitions at a date far removed from the primary and general elections, the statute places an unreasonably and unnecessarily heavy burden

on plaintiff McCarthy, thereby restricting his right to associate for the advancement of his political beliefs, and the rights of the other plaintiffs to associate freely for the purpose of expressing their political beliefs and to exercise effectively their right to vote. Plaintiffs further assert that by imposing an unreasonably early nomination deadline for independent candidates which is not applied to party candidates, § 120.240.1 invidiously discriminates between independent and party candidates, thereby denying plaintiffs equal protection under the laws as guaranteed by the Fourteenth Amendment.[1] In addition, plaintiffs contend that § 111.351, R.S.Mo. Supp. 1975, denies them equal protection of the laws because it permits defendant to place upon the ballot the names of candidates of political parties for President of the United States but does not permit the names of independent candidates for President to appear on the ballot.

Contending that the filing deadline imposed by Missouri's election law is a substantial and unreasonable burden upon the plaintiff's First Amendment rights and not necessary to protect any compelling and substantial governmental interest, plaintiffs correctly urge the Court to adopt the "strict scrutiny" standard of review applied in

[1]In essence, plaintiffs contend that the April 27 deadline for filing of nominating petitions by independent candidates is the equivalent not of the declaration of candidacy by party candidates--the deadline for which also is the last Tuesday in April--but of the primary election, or the filing of petitions by candidates of new political parties--the means by which other candidates are nominated and the deadlines for which, in 1976, were August 3 and July 31, respectively.

Williams v. Rhodes, 393 U.S. 23, 30 (1968), wherein the United States Supreme Court reiterated that "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." See Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Carrington v. Rash, 380 U.S. 89 (1965). Where rights of this kind are at stake, only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. NAACP v. Button, 371 U.S. 415, 438 (1963); Williams v. Rhodes, supra at 31; see also Oregon v. Mitchell, 400 U.S. 112, 238 (1972) (separate opinion of Brennan, White and Marshall, J.J.). Plaintiffs further cite three recent decisions by three-judge courts which, applying the "strict scrutiny" standard of review, have invalidated statutes establishing petition filing deadlines because they were too remote from the general election and thus placed unreasonable burdens upon the plaintiffs' rights to associate.[1] Salera v. Tucker, 399 F. Supp. 1258, 1267 (E.D.Pa. 1975) (three-judge court), aff'd summarily, ____ U.S. ____, 47 L.Ed. 2d 727, 44 U.S.L.W. 3526 (March 22, 1976); Bradley v. Mandel, ____F. Supp._____, Civil Action T 76-638 (D.Md., May 17, 1976) (three-judge court); Lendall v. Jernigan, Case No. LR-76-C-184 (E.D.Ark., filed August 20, 1976) (three-judge court).

[1]Having been filed after the statutory change concerning three-judge courts, this case does not require the convening of a three-judge court. See Public Law 94.381, August 12, 1976, § 7.

Defendant Kirkpatrick asserts that the following interests are served by the statute's filing deadline. He claims that the state possesses an interest in requiring independent candidates to declare themselves at an early date in order to demonstrate the seriousness of their candidacy and to assure that they have ample opportunity to get their message across. In addition, defendant Kirkpatrick contends that the early filing date for independent candidates eases the burden on the office of the Secretary of State and local election boards in verifying the signatures on nominating petitions and permits ample time for legal challenges to the Secretary's action with respect to that certification.[1]

The Merits

In Williams v. Rhodes, 393 U.S. 23 (1968), where the United States Supreme Court declared unconstitutional an Ohio statutory scheme which virtually precluded new or minor political parties from obtaining a position on the state's presidential ballot, the Court recognized that although the state has broad power to regulate elections, that power is subject to limitations imposed by the First, Fourteenth, Fifteenth, Nineteenth and Twenty-fourth Amendments to the United States Constitution.[2] While the state

[1]Defendant contends that the standard for measuring the magnitude of the state's interest is "minimum rationality" rather than "strict scrutiny."

[2]Since the Rhodes decision, Congress has passed the Twenty-Sixth Amendment, further limiting the state's power to regulate elections.

has a legitimate interest in restricting access to the ballot in order to maintain the integrity of the ballot and preserve an orderly election process, the Supreme Court has required that the means chosen by the state to achieve its goals be carefully scrutinized, for they necessarily place burdens on the right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters to cast their votes effectively. 393 U.S. at 30.

Although Williams v. Rhodes involved minor political parties the Supreme Court held in the later cases of Storer v. Brown, 415 U.S. 724 (1974), and American Party of Texas v. White, 415 U.S. 767 (1974), that independent candidates are entitled to the same ballot consideration. Thus a balance must be struck so that frivolous candidates are restricted while serious candidates are provided an opportunity to secure a place on the ballot. See McCarthy v. Askew, _____ F.Supp._____ (S.D.Fla. 1976) (filed Sept. 15, 1976); see also McCarthy v. Tribbitt, ____F.Supp.____ (D. Del. 1976) (filed Sept. 16, 1976); Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Jenness v. Fortson, 403 U.S. 431 (1971). As the Supreme Court stated in Lubin v. Panish, supra at 719, "The point, of course, is that ballot access must be genuinely open to all, subject to reasonable requirements." The Missouri General Assembly has not enacted "reasonable requirements" for the access of independent candidates to the ballot, and has fallen far short of demonstrating a compelling state interest to support the restrictions imposed by the statutes

challenged herein.

In Salera v. Tucker, supra at 1267, the Supreme Court affirmed summarily the decision of a three-judge district court that a filing deadline 218 days before the general election

> substantially impairs the ability of plaintiffs' candidates to qualify as eligible independent candidates, and so threatens to keep off the ballot candidates for whom eligible voters wish to cast their vote, thereby creating a "real and appreciable impact on the exercise of the franchise"
> . . .

Noting that the substantial burdens placed by the Pennsylvania statute on the ability of independent candidates to gain access to the ballot stemmed from forcing the candidates to complete their signature gathering "in a political vacuum," Id. at 1266, the Court rejected three interests which the state asserted in support of its statute. The Salera court stated that, as in the case at bar, the state's interest in securing sufficient time to resolve challenges to the nominating petitions and prepare the ballots in an orderly fashion did not require a deadline approximately seven months prior to the election, since without more than minor inconvenience, a candidate's name may be added to or removed from the ballots as late as September.[1] The state's interest in preserving

[1]For example, Missouri has provided by statute that the Secretary of State shall certify to the county clerk of each county within which any of the electors may vote for the candidates for such office, the name and description of each person nominated not less than forty-five days before any November election. § 120.570, R.S.Mo. Supp. 1975. In 1976, the statutory date for certification was September 18.

the integrity of the ballot by preventing defeated primary candidates from using the independent nomination process to thwart the will of the majority party failed in Salera, as it fails here, to justify a provision which inhibits the ability of all independent candidates, regardless of affiliation with the primary process, to obtain ballot position. Moreover, Missouri's election laws specifically prohibit an individual who has filed for any office in a party primary from filing as an independent candidate. § 120.240.2, R.S.Mo. Supp. 1975. Finally, the Court in Salera was not persuaded, as this Court is not, that the State's interest in promoting the intelligent exercise of the franchise was in any significant manner furthered by an early filing deadline for independent candidates.

In Bradley v. Mandel, supra, a three-judge district court invalidated a statute which, like Missouri's, required that independent candidates file their nominating petitions on the same day that candidates in primary elections were required to file declarations of candidacy. In 1976, that date was March 8, which was 70 days before the party primaries in Maryland and 238 days before the general election. In Missouri, the April 27 deadline for independents in 1976 was 97 days before the party primary. Pointing out that "Signature gathering by an independent candidate is not the equivalent of the filing of a declaration of candidacy by a partisan candidate; it is the equivalent of the primary election," the Bradley court noted that true equal treatment of partisan and independent candidates would require that "independent candidates. . .file a declaration of candidacy at the same time as partisan candidates and then extend the

date for the submission of signatures to the date of the primary election." Slip opinion at 11.

In Lendall v. Jernigan, supra, a three-judge court in the Eastern District of Arkansas declared unconstitutional the Arkansas statute which required an independent candidate to file nominating petitions with the Secretary of State by the first Tuesday in April preceding the general election, which in 1976 fell 210 days before the general election. As in Missouri, the filing date for independents' nominating petitions was the same date established as a deadline for filing of declarations by primary candidates of political parties.

Thus defendant Kirkpatrick has failed to demonstrate a state interest sufficiently compelling to warrant the substantial infringement by § 120.240.1 of plaintiffs' fundamental rights. In addition, defendant has failed to justify the distinction between independent and party candidates which is created by Missouri's election scheme. While an independent candidate must gather his petition signatures and file his petitions, under the Missouri statute, by the last Tuesday in April, party candidates are nominated in August, and candidates of new political parties need not submit nominating petitions until July 31, only a few days before the primary election. Thus, in the absence of a countervailing state interest, the filing deadline of the last Tuesday in April for independent candidates established by § 120.240.1 invidiously discriminates against independent candidates in violation of their rights under the

equal protection clause of the Fourteenth Amendment.[1]

Similarly, no compelling state interest has been shown to justify the failure of § 111.351, R.S.Mo. Supp. 1975, to provide for the names of independent candidates to appear on the ballot as it does for candidates of political parties. If states are required to afford access to the ballot for independent candidates, that access must be meaningful and not "merely theoretical." See Jenness v. Fortson, supra at 439. As plaintiffs correctly have pointed out, denying plaintiff McCarthy a place for his name on the general election ballot, eventhough, as defendant maintains, his electors might be accorded a position, provides McCarthy access to the ballot in theory only. If an independent candidate has satisfied the various state interests in regulating access to the ballot, the state cannot constitutionally manipulate the form of the ballot to exclude his name from voter consideration. See McCarthy v. Shanahan, Civil Action No. 76-237-C6 (D. Kan., filed June 17, 1976); McCarthy v. Slater, No. 49,899 (Okla., filed July 23, 1976); see also American Party of Texas v. White, supra at 794-5; Storer v. Brown, supra at 745-6. Therefore, § 111.351, R.S.Mo. Supp. 1975, invidiously discriminates against independent candidates in violation of their rights under the equal protection clause of the Fourteenth Amendment.

The Secretary of State has refused to certify plaintiff McCarthy as a candidate for President of the United

---

[1] In the context of the facts presented in this case, a filing deadline of no earlier than July 31 would appear reasonably supportable against this type of constitutional challenge.

States on the official ballot of the State of Missouri on the basis of the two statutes which the Court herein finds and declares to be unconstitutional, null and void. Because the Court therefore finds that plaintiff has wrongfully been denied a place on the ballot, the only effective remedy is to order that placement. Accordingly, for the foregoing reasons, it is hereby

ORDERED that § 120.240.1, R.S.Mo. Supp. 1975, establishing the filing deadline for nominating petitions of independent candidates for offices to be filled by voters of the state at large, is unconstitutional, null, void and to no effect, and enforcement thereof shall be, and is hereby, forever enjoined; and it is further

ORDERED that § 111.351, R.S.Mo. Supp. 1975, failing to provide that the names of independent candidates for President of the United States are entitled to appear on the official ballot in the State of Missouri and that a vote for such a candidate is to be counted as a vote for the electors designated in the candidate's nominating petition, is unconstitutional, null, void and to no effect, and enforcement thereof shall be, and is hereby, forever enjoined; and it is further

ORDERED that defendant shall certify the name and candidacy of plaintiff McCarthy for inclusion on the official ballot to be voted on at the November 2, 1976, general election, with the effect that a vote for plaintiff McCarthy be counted as a vote for the electors designated in plaintiffs' nominating petition.

Edwin B. Hunter
United States District Judge

U.S.D
EASTERN DIS.
SEP 27 6 28 PM '76
NELSON B. JONES
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

EUGENE McCARTHY and
GEORGE KEHOE

VS.

PAUL J. HARDY,
Secretary of State, State
of Louisiana

SECTION "A"

No. 76-2947

CIVIL ACTION

O R D E R

Plaintiffs in this case filed their complaint and motion for temporary restraining order and motion for preliminary and permanent injunction at 5:31 P.M. on September 24, 1976, and forthwith presented same to the undersigned judge for action.

The Court informed the plaintiff that it was unable at that time to act upon the complaint and motion for temporary restraining order because there was not attached to same an affidavit in compliance with Rule 65(b) of the Federal Rules of Civil Procedure. However, thereafter, the Court contacted the Office of the Attorney General for the State of Louisiana and requested that they have representatives present at 12:00 Noon on Saturday, September 25, 1976 to meet with plaintiff in order to discuss the relative merits of the complaint.

that they have representatives present at 12:00 Noon on Saturday, September 25, 1976 to meet with plaintiff in order to discuss the relative merits of the complaint.

The conference was held, and after discussion, it was agreed that an evidentiary hearing in connection with the complaint be held on Monday, September 27, 1976, at 1:30 P.M. The parties were requested, if possible, to file a memorandum and list of authorities with the Court sometime Monday morning prior to the hearing.

As a result of the aforesaid, the Court is of the opinion that the petition for a temporary restraining order has now been converted into a hearing on an application for a preliminary injunction and the Court, in view of the urgency of the matter under consideration, in accordance with Rule 65(a)(2), hereby advances and

FBI
PROCESS
CHANGE
MAIL
FILED
STAMPING
EXHIBIT No.

Exh. E

consolidates this hearing for a preliminary injunction with the trial of the action on the merits.

FINDINGS OF FACT

The Court finds that:

1. It was stipulated by the parties that plaintiff filed with the Secretary of State a list of signatures of at least the number required by the Statute to require the Secretary of State to place the name of plaintiff and the electors of Eugene J. McCarthy on the ballot for the general election to be held on November 2, 1976 (P-6).

2. Eugene J. McCarthy is a serious candidate for the Office of President of the United States.

3. Prior to October 21, 1974, Mary Meehan, Research Director Committee for a Constitutional Presidency, addressed inquiry to the Office of the Secretary of State, State of Louisiana, requesting election information. In response thereto, copies of the General Election Law, amended through Regular Session 1973 were forwarded by letter of Secretary of State Wade O. Martin on the above date (P-1, P-9).

4. On May 6, 1975, Miss Meehan addressed a letter to Wade O. Martin, Secretary of State, acknowledging receipt of the General Election Law booklet and noting that on page 41 all nominating papers for independent candidates are to be filed on or before the date of the second primary and inquiring as to the date of the second primary in 1976. In response thereto Miss Meehan, or her office, received from the Secretary of State a document listing the presidential and congressional election schedule for 1976 and indicating that the second primary was to be held September 25, 1976.(P-3, P-4).

5. According to Exhibit P-9 at page 41, all nominating papers for independent candidates for president are to be filed with the Secretary of State on or before the date on which the second primary is to be held to nominate candidates by political parties. Therefore, according to the information contained in Exhibits P-9 and P-4, nomination papers filed by plaintiffs would be filed no later than September 25, 1976.

6. On April 20, 1976, Miss Mary Meehan addressed a letter dated April 20, 1976 (P-8A through 8D) to Mr. Robert Hughes of the Election Division of the Office of the Secretary of State. By letter of April 26, 1976 (P-2), Wade O. Martin advised Miss Meehan that her letter had been forwarded to the Louisiana Attorney General's Office for opinion.

7. On May 17, 1976, the Office of the Attorney General of the State of Louisiana issued Opinion Request No. 76592 (P-5A and B) responding to the aforesaid letter P-8A through D, noting certain exceptions therein by setting forth that it was "basically correct as to all other items." It did not take any exception whatsoever to the date of September 25, 1976 as being the date on or before which nomination papers must be filed.

8. In July, 1976, plaintiffGeorge Kehoe addressed a request for election information to the office of the Secretary of State and in response thereto received a booklet identical to Exhibit P-9 with the exception that Paul J. Hardy is designated as Secretary of State on the cover of said booklet (P-13). The content of page 41 of P-13 is identical to that of P-9, which was again giving plaintiff information that September 25, 1976 was the critical date.

9. There was in existence on or about June 1, 1976 a document issued by the Secretary of State setting forth election information which on page 7 indicates that August 14, 1976 was the last date to file nomination papers (D-2). However, this document

was never forwarded to plaintiff. The Secretary of State's office at no time forwarded to plaintiff the law as amended in 1974, although at all times pertinent hereto the law had been amended specifically at Section 624-C providing that the last day to file nomination papers was the date of the first primary.

10. The State of Louisiana at this time refuses to place the name of plaintiff and the electors on the November 2, 1976 ballot (P-7).

CONCLUSIONS

1. The Court is of the opinion that this matter is properly within the jurisdiction of the Court. 42 U.S.C. 1983. Plaintiffs allege that they have been deprived of the opportunity to place the name of electors for independent presidential candidate EugeneMcCarthy on the ballot in Louisiana. This deprivation is alleged to have resulted from the actions, albeit, unintentional, of representatives of the State of Louisiana,

specifically in the offices of the Secretary of State and the Attorney General for the State of Louisiana.

2. According to the law of Louisiana as amended in 1974, nomination papers for an independent candidate such as Mr. McCarthy should have been filed no later than the date of the first primary or no later than August 14, 1976.

3. Prior to the 1974 amendment, such nomination papers would have been timely filed if filed with the Secretary of State on or before the date of the second primary, which in 1976 was scheduled originally for September 25, 1976 (this was changed to October 2, 1976 due to a religious holiday which fell on the previously assigned date precluding the election at that time).

4. Although the election law, specifically section 624(c)

changing the deadline date was amended as of the date of the plaintiff's representatives' initial inquiry to the Secretary of State, there was not at any time any indication made by that office to plaintiff's representatives of that fact that the law had been amended up to and including plaintiff's request for information as late as June of 1976. Defendant has argued that plaintiffs are charged with knowledge of the law and further cannot rely on opinions of the State Attorney General's office as regards deadlines or prescriptive matters. Although this may generally be the case, it is felt that in the situation at bar application of such principles would be both inequitable and in derogation of plaintiff's constitutionally guaranteed right to equal access to the electoral process. In this case an agency of the state government forwarded an outdated formula for placing an independent candidate's elector's names on the ballot which incorrect information was in effect ratified by still another state agency upon specific inquiry. From the outset plaintiff's representatives exhibited a real interest in placing Mr. McCarthy's name on the ballot and in complying with the law of Louisiana governing. Plaintiffs did in fact comply wtih the law as it was supplied to them.

The agencies of the State of Louisiana voluntarily supplied information to plaintiffs which was relied upon by plaintiffs to their detriment. Under the circumstances it is the opinion of the Court that defendant is estopped from asserting the August 14, 1976 deadline date as against plaintiffs, thereby preventing candidate McCarthy from being represented by electors on the ballot. Prebensen & Blakstad v. Board of Commissioners, 241 F. Supp. 757 (E.D. La. 1965).

5. The state has argued that it is physically impossible to place another candidate's name on the ballot due to the construction of the voting machines utilized in Louisiana and the provisions of La. R.S. 18:1174. However, it is felt that this fact cannot control.

The state would have faced the same problem even had the McCarthy supporters filed their nomination papers by the August 14th deadline. The Court recognizes the problems which may be entailed by the state as a result of the Court's holding herein, and the right of the state generally to keep its ballots within manageable limits. Bullock v. Carter, 405 U.S. 131, (1972). However, as stated by the Court in Lubin v. Panish, 415 U.S. 709, 716, it is this Court's opinion that:

> This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

Accordingly,

IT IS ORDERED that the State of Louisiana and/or the Secretary of State be and they are hereby permanently enjoined from the further printing and distributing of election ballots without including the name of Eugene J. McCarthy as President, Hugh W. Long as Vice-President, and plaintiff George Grady Kehoe and the McCarthy electors listed on the nomination paper attached to plaintiff's complaint.

IT IS FURTHER ORDERED that any ballots distributed by the Secretary of State include the aforesaid named.

IT IS FURTHER ORDERED that the Secretary of State be and he is hereby enjoined from using voting machines in the election to be held on November 2, 1976 which do not make provision for and include the name of the aforesaid presidential electors pledged to Eugene J. McCarthy.

New Orleans, Louisiana, this 27th day of September, 1976.

Charles Schwartz, Jr.

The New York Times

THE NEW YORK TIMES, WEDNESDAY, SEPTEMBER 29, 1976

McCarthy Is Given Theoretical Chance At Election Victory

Special to The New York Times

WASHINGTON, Sept. 28—Eugene J. McCarthy, running as an independent candidate for President, has won ballot status in enough states with enough electoral votes to make his election in November at least theoretically possible.

In the last two days the former Democratic Senator from Minnesota won court contests that resulted in his being listed in four more states: Texas, Massachusetts, Maryland and Utah.

This raised his total to 29 states with a total of 318 electoral votes. To win the Presidency, a candidate must take a majority of the 538 electoral votes, or 270. McCarthy representatives are involved in litigation in 11 other states, and two more are still considering whether or not to certify him for a position on the ballot.

Democratic leaders are fearful that Mr. McCarthy might win enough votes that would otherwise go to Jimmy Carter in some key states to shift their electoral votes to President Ford and, conceivably, determine the result of the election.

In California, Mr. McCarthy failed to get on the ballot as an independent but he is negotiating with the Peace and Freedom Party to have its electors replace their present candidate, Margaret Wright, with him. This would not put his name on the ballot but would permit him to campaign for Wright votes and obtain electors if he carried the state.

In New York, McCarthy supporters filed more than the required number of signatures, but they have been challenged and a decision may not be reached until Oct. 8.

Until his court victories yesterday and today, Mr. McCarthy was not assured of ballot positions in enough states to win a majority of the electoral vote, and his opponents could argue that a vote for him would be wasted because his election was not statistically possible.

Exh. F.

A:SBK:MKS
16/76

LAW OFFICES OF
JOHN C. ARNOLD, P.A.
SUITE 420
711 W. 40TH STREET
BALTIMORE, MD. 21211
(301) 235-0175

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EUGENE McCARTHY, et al	*	
Plaintiffs	*	
v.	*	Case No. 76-1697
JAMES CARTER, et al	*	
Defendants	*	

* *

BRIEF OF BEHALF OF EUGENE J. McCARTHY

The Memorandum and Order of the F.C.C. concerning exemption of presidential debates from 47 USC 315(a) was made in the abstract, without a specific factual context. Now it is necessary to apply that Opinion to the facts of the 1976 Presidential election. For the fifth time this century, there are three candidates, rather than two, who will be on the ballot in enough states to be elected President. This year those candidates are Carter, Ford and McCarthy. Mr. McCarthy has brought this suit (along with some of his electors, potential voters for all candidates, and undecided and non-voters) to get a declaration that the debates violate the F.C.C. Opinion and Law, and the Constitution, if McCarthy is excluded. McCarthy seeks such injunctive relief as the Court can grant, subject to the restraints discused infra.

This brief is divided into the following sections: I. Jurisdiction, II. McCarthy is one of three "Major Candidates", III. Violation of Equal Time, IV. Violation of Fairness Doctrine, V. Separate is Inherently Unequal, VI. Relief Possible, VII. Policy Underlying the Decision, VIII. Summary & Conclusion.

Exh. G

I. Jurisdiction

At the preliminary conference some attorneys for some Defendants indicated they would argue lack of jurisdiction of this Court in this matter. An F.C.C. ruling which a party disagreed with, would be appealable in the first instance to the D.C. Court of Appeals, 47 USC 402(a)

At the filing of this suit, McCarthy had ample grounds to believe that the F.C.C. would not act at all on any complaint he might make. (Additional Affidavit of McCarthy, paragraph 13.)

Since the filing of the suit, the F.C.C. has apparently moved on the Maddox complaint, which is similar to McCarthy's in this Court, and may have a final decision by 1 p.m. on 17 September 1976. (Additional Affidavit, paragraph 13) However, the F.C.C. is barred from granting any pre-violation relief. 47 USC 303, and FTC v. Dean Foods (1966) 384 US 597, Scripps-Howard Radio v. FCC (1942) 316 US 4.

It is possible that the Defendant F.C.C. has expedited the Maddox complaint, after this suit was filed, to cut away the jurisdiction of this Court. The fact remains that injunctive relief is available only from this Court, and not from the F.C.C.

In the same manner, and for the same reasons as with the F.C.C., this case is properly before this Court concerning the Federal Election Commission ruling of 30 August 1976 concerning the League's receipt of, and use of, funds for the debates. The FEC also has no power to enjoin receipt or spending of funds before the fact. Only this Court, in the first instance, may fashion such relief.

II. McCarthy is one of three "Major Candidates"

Of the hundreds of F.C.C. Rulings and Court decisions on the equal time provisions of 47 USC 315(a), none have been concerned with debates by Presidential candidates, and those concerned with all offices other than President or Vice-President do not fit exactly, and must be forced.

Among the some 20,000 local, state and national elected positions in the United States, those of President and Vice-President are unique. Before the primaries and petition deadlines have passed, there can be substantial confusion as to who are, or are not, candidates. After those deadlines, the confusion remains only with respect to President and Vice-President.

After the primaries and petitions are over, there is an absolute litmus test for all except 2 of the 20,000 or so elected offices. All except 2 are, at that point, either on or off the ballot in their one jurisdiction. There is no middle ground. (This analysis ignores write-in possibilities since in the nation's history no candidate for President or Vice-President has ever received a single electoral vote as a write-in candidate.)

Only with regard to President and Vice-President does confusion persist as to who are the candidates, after the deadlines. There are two reasons. First, these are the only candidates who run in multiple jurisdictions. Candidates may be on the ballot in some jurisdictions, and not in others. Second, there is an aura of the Presidency that attracts individuals, for related reasons, either to attempt to kill the President, or to run for the office; both usually hopeless enterprises.

The quadrennial plethora of so-called candidates for President, as opposed to the need of the public to be fully informed on the serious candidates, was a dilemma which the F.C.C. sought to solve in its Memorandum Opinion and Order (hereafter F.C.C. Order) of 25 September 1975, 55 FCC2d 697. Despite the vigorous dissent to that Order, and despite the vigorous dissent to the case upholding it, (Chisholm, et al v. FCC, et al, U.S. Ct. of App. for D.C., No. 75-1951 and 75-1994, 12 April 1976) McCarthy accepts that this Court is bound by that F.C.C. Order, and by Chisholm.

The Court still has the task, however, of applying that F.C.C. Order to the facts. In its Order, the F.C.C. makes clear its belief that it both had the power, and the obligation, to act as it did to avoid the "Lar Daly" problem. 55 FCC2d 698. In that, McCarthy entirely agrees. Without a solution to the all or nothing problem on Presidential debates, they would obviously "dry up", as the F.C.C. noted.

The F.C.C. found that Congress, by amending §315(a) in 1959 intended to allow the Commission to exercise its discretion to afford "broadcast coverage" to "major candidates," 55 FCC2d at 705. McCarthy submits that neither could Congress have constitutionally passed a bill, nor the F.C.C. an order, which specified that debates would be exempt from equal time if they included the "Republican and Democratic nominees." Any such declared political monopoly would be such a clear affront to the First and Fifth Amendments that no Court would hesitate to strike it down.

Any subsequent interpretation of "major candidates" which means solely Republican and Democratic, and no others, would be an equal affront to the Constitution. "Major candidates"

must be interpreted by this Court according to some objective standard that admits of the possibility of someone other than the Republican and Democratic nominees.

It is settled law that when a Court is interpreting a statute or regulation, and one interpretation would lead to a result even possibly unconstitutional, and the other not, the Court must choose the latter, U.S. v. LaFranca, 282 US 568, 75 L.Ed. 551, 51 S.Ct. 278.

Defining who are the "major candidates" is largely an uncharted wilderness. No courts and no agencies have addressed this question. Congress, however, has.

The Federal Election Funding Act, as amended, became fully operational for the first time in 1976. While Congress did not use the phrase "major candidates" in that Act, it was clearly addressing that question for minor party candidates in the Presidential election. In order for such candidates to receive federal matching funds they had to meet two criteria: being on the ballot in 10 or more states (26 USC 9002(2)(B)), and receive 5% or more in the election (26 USC 9004(B)).

Congress also addressed the question of who is a realistic candidate in the Federal Election Campaign Act, Public Law 94-283. providing that presidential candidates in the preference primaries for party nominations were entitled to matching funds if, inter alia, they raised $5,000 each in 20 states (Section 9033(b)), and did not have two consecutive primaries in which they received less than 10% of the vote (Section 9033(c)(1)(B)).

It is instructive that Congress gave the Federal Election Commission no discretion in these definitions. Congress wanted the cut-off point between serious candidates, and fringe

to be quite clear. It is self-evident that both Ford and Carter would meet all of these criteria. It is also self-evident that McCarthy, as an independent candidate, is not governed by them. (The constitutionality of excluding independents from funding was explicitly left for another day, in Buckley v. Valeo (1976) __US__, 46 L.Ed.2d 659.)

The analogy for use here is that Congress defined a realistic candidacy in two ways, support shown in a large number of states, and also shown by popular votes. Considering that presidential preference primaries are in some cases not binding at all, being mere "beauty contests,", McCarthy suggests that such a requirement can properly be compared to showings in reputable polls such as Harris, Gallup, and Yankelovich.

There is a rule of reason used in many areas of life where prejudgment as to who will ultimately prevail is improper, and non-partisanship is required, to include in all who have a mathematical chance, and exclude the remainder. For instance, the American Baseball League permits all those teams with a mathematical chance of victory early printing of world series tickets, and no others.

This Court can take judicial notice that a majority in the electoral college can be achieved in the 16 largest states alone--which is in between the Congressional standards of 10 and 20 states. In the facts of this case, only McCarthy, Carter and Ford meet the definitions of 20 or more states, a possible majority in the electoral college, and more than 5% in the polls.

Also as a matter of history, other than Republican and Democratic candidates, only four people met these definitions in this century; George Wallace in 1968, Robert LaFolette in

1924, and Theodore Roosevelt in 1212. (Henry Wallace is eliminated by his 1% vote, in 1948.)

In short, McCarthy submits to the Court that the "major candidates" for whom "broadcast coverage", including debates, was sought by the F.C.C. Order, are, in 1976, Gerald R. Ford, James E. Carter, Jr., and Eugene J. McCarthy--no more, and no less.

In the 18 jurisdictions in which final decisions have been made on legal challenges by McCarthy, two Courts have had to rule as a matter of law whether McCarthy is a serious candidate for President. On an original action in the Supreme Court of Oklahoma the Court ruled 6-2 (without dissenting opinion) that Oklahoma law was unconstitutional for providing absolutely no way for an independent to run for President there. The Court ordered election officials to accept the filing fees proffered by the presidential electors, and place McCarthy on the ballot. Since no petitions whatsoever had been gathered in Oklahoma, it reached this factual and legal finding about McCarthy.

"Although one might challenge the possibility of success of the independent candidacy of McCarthy, it is difficult to challenge the seriousness of that candidacy. His supporting affidavit sets out his serious effort to win the presidency, his political experiences, and record, and the substantial number of states in which his independent candidacy will appear on the general election ballot."

Slip opinion, McCarthy v. Slater, et al, Supreme Court of Oklahoma, case No. 49,899, 23 July 1976.

In McCarthy, et al v. Askew, et al, U.S. Dist.Ct., Southern District of Florida, case No. 76-1460-CIV-NCR, Judge Roettger issued order from the bench on 10 September 1976 that Florida law is unconstitutional for flat prohibiting an independent candidacy for President, and ordered McCarthy on the ballot. In Florida, too, there had been no petitioning whatsoever. The

Court's written opinion was scheduled to be issued 14 September 1976, and McCarthy does not yet have a copy. It is anticipated, however, that it will have a finding similar to that in Oklahoma, since the states have a recognized legitimate interest in placing on the ballot only candidates who possess community support, and this support is normally shown through petitions.

A third Court in Texas had the same issue presented, but did not reach it. In McCarthy, et al, v. Briscoe, et al, U.S. Dist.Ct., Western Dist. of Texas, Austin Division, the three-judge Court ruled unanimously that the Texas election laws are unconstitutional for failure to provide any method for an independent to run for President. No petitioning had been done in Texas. The Court denied relief on grounds of laches, saying,

"Balancing the equities, and deploring the time limitations which compel us to choose between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights, we conclude that injunctive interference by us at this late stage would not be warranted."

Slip opinion, page 2 (Briscoe is now before the Fifth Circuit Court of Appeals in light of the conflict within the Circuit between Texas and Florida, and in light of the Oklahoma decision) This Court may be surprised to know that, despite the clear ruling of the Supreme Court in Storer v. Brown (1974) 415 US 724, 39 L.Ed.2d 714, that no state may discriminate between party candidates and independents for President, at the beginning of this year 15 states flatly forbade independent candidacies for President. Three states reinterpreted their laws without suit, two entered into consent decrees after suit was filed, laws of five states have been declared unconstitutional, and four cases are pending. (In one state, no counsel is available.) Other cases on other issues have been won, or are pending. (See Additional Affidavit, paragraph 14.)

The issue in this Court is closely related to the above line of cases since the seriousness of McCarthy's candidacy, and also the question of discrimination between different candidates for the same office, are present in the instant case as well.

Such a rule of reason avoids the Lar Daly problem, not only in this election, but in all elections, based on history. It also, however, avoids giving the F.C.C. Order an interpretation of reserved-for-Democratsand-Republicans-only, which would be plainly unconstitutional.

III. Violation of Equal Time

In its approval of the F.C.C. Order, the Chisholm court adopted and approved the Commission's standards for use in its administrative exemption from the Equal Time provisions of 47 USC 315(a). As statedin the slip opinion, page 4, they are:

1. Initiated by non-broadcast entities
2. Covered live
3. Made on good faith determination that they are a "bona fide news event"
4. Showing no evidence of broadcaster favoritism

McCarthy notes that Courts have the power to compare reality of the legal fiction in which parties have clothed it. A classic example is piercing the corporate veil. (citations omitted) Without further discussion, and noting only that the Defendants apparently have chosen not to contest the facts, he leaves to the Court determination whether the Ford-Carter debates have been "initiated" by the League, or, in reality, have been jointly initiated by the League, Ford and Carter, and the networks, since the commitment and participation of each was critical to the enterprise.

Qualification 2 is met.

Qualification 3 depends in part on the answer to 1. If the Court finds that the debates exist only because of pre-promised network coverage, and would not exist without that, then the bona fides of the networks are in serious question. It is one thing if a candidate calls a press conference, and holds it for whatever press representatives come. McCarthy submits that it is quite another thing if the candidate invites the press, but says there will be no press conference unless they commit themselves in advance to show up. In the latter case the media are creating the "news" which they purport to cover.

By analogy, McCarthy draws the Court's attention to the well-established area of the law concerning bona fide purchaser for value. If the purchaser has full knowledge of, and even participation in, the activities of the seller, he is not a bona fide purchaser. (citations omitted). McCarthy leaves to the Court's determination whether the networks have met criterion 3.

The last criterion is the clearest one in this case. Even if the Defendants sharply and vigorously contested the facts, McCarthy believes that the Court would find that the presence of Ford and Carter in the debates, and the absence of McCarthy, "favors" both Ford and Carter, at the expense of McCarthy.

McCarthy believes the Court will find that every aspect of the proposed Ford-Carter debates, from the announcement that they would occur, through the commentaries that would follow them, give the impression, both deliberately and unconsciously, that only Ford and Carter are the genuine candidates, that only one of them can and will be elected, and that a vote for McCarthy is hopeless in terms of elective results.

The Court may initially have wondered why the long

section on "major candidates" appeared in this brief. The Court in Chisholm, supra, recognized but did not discuss or define the distinction between "serious" and "fringe" candidates. Slip opinion, p. 9, note 7. The point is this: to say of a candidate who has no chance mathematically that he has no chance is not favoritism, but honest reporting. However, to say or imply of a candidate who has a chance, that he has no chance, is clear favoritism.

The F.C.C. opinion, 55 FCC2d at 707, states without supporting documentation, "Realistically, the liklihood of broadcaster abuse is remote in the coverage of more prominent political races (President, Senator, Governor, etc.)." The networks know which side their advertising budgets are buttered on, and that the Republican and Democratic Parties are going to be around for many more tens of millions of dollars. Also, it is far easier to report and handicap a two-man race, than a three-way one. Abuse has arisen at the very first opportunity. It is a classic example of a regulatory agency turning over to members of the regulated industry discretion to do what they think wise in their own opinion -- with the classic results.

It is the first order of business of any organization not to promote its stated political, social or economic goals, but simply to survive. And it is part of that goal to persuade or coerce others to help in that effort. The Republican and Democratic Parties, and their candidates, are not to be faulted for following human nature.

The League, too, is beyond the reach of this Court, for accepting the take-it-or-leave-it, two-man debate proposal of the parties. The League's position is a betrayal of its long and hallowed tradition of non-partisan voter education, but by itself it is no violation of the law.

What is a violation of the law is favoritism by the broadcasters, under the F.C.C. Order and the Chisholm decision,

playing an essential role in creating the Ford-Carter debates, knowing all the while that one, and only one, serious or major candidate was excluded.

If the Republican and Democratic Parties had a sense of history, rather than a sense of survival, they would recognize that neither Thomas Jefferson, nor Abraham Lincoln, the two great presidents they claim to be descended from would have been considered serious candidates, nor permitted to debate with the candidates of two larger, stronger, established parties of the time.

VI. Violation of Fairness Doctrine

The point that the proposed Ford-Carter debates amount to an accusation, that McCarthy is not a serious candidate, and that a vote for him is wasted, is fully made in the previous section. McCarthy would add at this point, however, that the Fairness Doctrine developed from administrative and judicial decisions, independent of and prior to the present form of 315(a), and is not abrogated by the F.C.C. Order.

McCarthy leaves to the Court's determination whether the Ford-Carter debates are an attack on McCarthy's candidacy. If they are, then the Fairness Doctrine requires opportunity to defend against that attack.

Ordinarily, claims of violation of the Fairness Doctrine require first a request to the broadcaster, a refusal, and an appeal to the F.C.C., all steps being taken after the fact. Red Lion Broadcasting Co. v. FCC (1967) 127 US App.D.C., 129, 381 F.2d 908.

For the reasons set forth in the next Section, there

is not, and cannot be, adequate relief after the fact.

V. Separate is Inherently Unequal

In the Landmark case of Brown v. Board of Education (1954) 347 US 483, 98 L.Ed. 873, the Supreme Court found that, "in the field of public education the doctrine of 'separate but unequal' has no place. Separate educational facilities are inherently unequal."

The case law is clear that the right of any citizen to run for office, or to vote for any candidate, on a non-discriminatory basis is basic to all other freedoms guaranteed by our government. (citations omitted) McCarthy submits, quite simply, that in these debates separate is also inherently unequal, and that the only remedy, as in Brown, is a termination of the separation, relief that only this Court, not the F.C.C., can grant.

To carry the analogy further, McCarthy points out that in the field of education the courts have also applied a rule of reason. A child who is severely handicapped, or severely retarded, or adjudged a repeated and dangerous delinquent, may be excluded from ordinary schools, both for his benefit and the schools. In short, if it is impossible for a child to benefit from a normal school, his exclusion is constitutional, but not otherwise. (citations omitted)

The same, McCarthy submits, is true of these debates. A candidate who cannot possibly win may be constitutionally excluded. One who can win, however, is entitled to injunctive relief to prevent the stamp of inferiority. And that is the only relief which can prevent irreparable injury.

V. Relief Possible

McCarthy confidently expects that the Defendants will advance strong arguments against injunctive relief, on the grounds that prior restraint of freedom of speech is impermissible.

This argument does not touch the declaratory relief requested of this Court. The obscenity laws, the libel laws, and the F.C.C. statutes have all been held constitutional, under attack as prior restraints, where penalties were not imposed until after the violation occurred. (citations omitted)

A declaratory judgment, therefore, that some or all of the Defendants will violate the law if they persist on their chosen course, and that they will be subject to very severe fines for contempt of court if they persist, would be entirely constitutional.

A second point is that, especially in cases concerning movies, a limited delay for the purposes of administrative and immediate judicial review has been held constitutional. Since these debates are scheduled over more than a month, a temporary stay of, say, seven days would apparently comport with the Constitution. See Carroll v. President and Commissioners (1968) 393 US 795, and Bantam Books, Inc. v. Sullivan (1963), 372 US 58.

The third point is that an injunction against the League of Women Voters, barring them from collecting or spending any funds in violation of the Federal Election Funding Act would not be any prior restraint of free speech, as su

Fourth, if the facts alleged are not controverted, and perhaps even if they are, the Court has ample ground to

find that the networks normally carry about four minutes per candidate, per night (for Ford and Carter only) on their evening news. This is distilled from up to eight hours or more of campaigning by the candidates in a day. McCarthy suggests, therefore, that it would be no prior restraint to order the Defendant networks to carry only the same coverage of the debate on 23 September 1976 (if McCarthy is excluded), than they have established as their chosen pattern of coverage, namely four minutes each.

Fifth, the principal case upholding the entire statutory scheme of F.C.C. regulation of broadcasters, and subsequent decisions concerning the F.C.C.'s right to deny license renewal, made despite First Amendment attacks, note the distinction between the broadcasters, using exclusive frequencies granted to the public, and other press, and validate great control of content for broadcast media than for the balance of the press. Red Lion Broadcasting Co., supra, Democratic National Committee v. F.C.C., 460 F.2d 891.

Sixth, McCarthy submits that the entire argument of the Defendants that freedom of speech is threatened, turns the Constitution on its head. It is clear that McCarthy does not seek to stop the debates, but to join them. Mandatory relief is not sought because McCarthy sees no basis in law by which the Court could order Defendants Ford and Carter to debate with McCarthy. What is really at issue here is not the freedom of speech of Ford or Carter, nor the right of the networks to carry the news. What is at issue here, and already threatened with prior restraint, is the right of McCarthy as a serious candidate to speak to the voters, and their right to hear him.

Lastly, and perhaps most importantly, the power of this Court is maybe greater to grant preliminary relief, than permanent relief. In the case cited, a probationary federal employee (who had no statutory right to statement of cause and hearing before termination), requested and received a temporary injunction against her dismissal, to preserve the status quo ante. The Supreme Court reversed, but only on the grounds that her damages were susceptible to money judgment. See Murray v. United States (1974) 414 U.S. 378. See also on prior restraint Nebraska Press Assn. v. Stuart (1976) US , 96 Sp.Ct. 2791, 30 June 1976.

Of similar import is the stay granted this spring by Mr. Justice Powell, preventing the execution of some 200 prisoners in states whose death penalties had just been declared constitutional by the Supreme Court, at the behest of counsel who had just filed a petition for rehearing. (citation omitted) Since the Supreme Court had just exhaustively ruled on the question, it is hard to imagine a case in which the possibility of ultimate success was more remote. Yet Mr. Justice Powell recognized that the irreparable injury was massive, and granted the stay. McCarthy suggests that the equities in this case are the same; that political execution is what is threatened.

VII. Policy Underlying the Decision

No one gave Jimmy Carter a chance to achieve his impossible dream of nomination, either.

The policy, which the F.C.C. Order found in Congressional actions, and which the Court in Chisholm affirmed, was to increase the opportunity of the voters to see and hear major candidates for President. McCarthy agrees absolutely with this policy.

But this policy cannot be perverted to allow the F.C.C., or any broadcasters it regulates, nor the FEC, and any contributors it regulates, to predetermine for the people who they will have as their representatives. We started a war in 1776 over precisely this issue, the imposition of leaders not of our choosing.

This has been a year of political miracles. No experienced observer, including the sages of the networks, gave Carter a chance for the nomination, when he announced his candidacy for the nomination at the National Press Club in December, 1975, then showing 3% in the polls.

Just before the North Carolina primary, no one gave Reagan a chance for the Republican nomination. This Court can take judicial notice of how close he came to achieving what McCarthy did in 1968.

Now no one gives McCarthy a chance for election, even though he can do it with his potential electoral votes.

In short, it is the substance of our national being that the people are sovereign. No federal agency, and no organization subject to the jurisdiction of any agency, have a right to decide for the American people who they should select as President of the United States.

VIII. Summary and Conclusion

For the reasons stated, and on the facts presented, the potential voters of the United States will be denied the fair and full discussion of the issues by the major candidates, which is the fundamental purpose of Congress and the F.C.C., unless this Court grants both declaratory and injunctive relief, and does so in clear and unmistakeable terms.

Respectfully submitted,

John C. Armor

Philip L. Marcus
ARMOR & MARCUS, P.A.

Craig Sawyer
Attorneys for the Plaintiff
McCarthy, et al

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUGENE McCARTHY, et al,	*	
Appellants	*	
v.	*	Case No. 76-1865
JAMES CARTER, et al	*	
Appellees	*	

* *

BRIEF OF APPELLANTS
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION AND REMAND

David Meyers, Esq.

Craig Sawyer, Esq.

John C. Armor, Esq.

Attorneys for
Appellants

Exh. H

BRIEF FOR APPELLANTS, EUGENE McCARTHY, et al

Since the above case was disposed of by the trial court, on a Motion to Dismiss, all facts properly pleaded there are taken as true. (In addition, all facts in the Complaint were supported by very thorough affidavits of Senator McCarthy. Appellants submit, quite simply, that under the FCC Order which was affirmed in Chisholm, et al v. FCC, et al, U.S. Ct. of App., cases no. 75-1951 and 75-1994, and on these facts, this Court should enjoin the Defendant networks from proceeding with the Ford-Carter debates as planned, and should remand to the District Court with instructions to make the injunction permanent within five to seven days, if the facts are proven as alleged and under oath.

I. The Facts

1. Eugene McCarthy is an independent candidate for President, whose name will appear on the ballot in at least 32 states, possessing at least 342 electoral votes. (Complaint, ¶46, Additional Affidavit of McCarthy, ¶14) (hereafter, citations are to "Cmpt." and "AAMcC")

2. The exclusion of McCarthy from the presidential debates was demanded and gotten by the Defendant Carter. (Cmpt., ¶22, 57)

3. McCarthy, Ford and Carter are the only candidates who will appear on the ballot in sufficient states to have a mathematical chance at a majority in the electoral college. (Cmpt., ¶46, 48, 49; AAMcC ¶12)

4. In this century, only five candidates have ever had a mathematical chance of a majority in the electoral college. (AAMcC, ¶4) The number decreases to four if a criterion of 5% or more support is applied. (AAMcC, ¶4)

5. At least 70 million potential voters, half of the American electorate, or more, do not intend to vote in the November election because they are dissatisfied with the Republican and Democratic Parties, and their Presidential candidates, Ford and Carter. (Cmpt. ¶50, 51, 52; AAMcC, Exhibits B, D, E)

6. On regular network news broadcasts, McCarthy has received as a candidate in 1976, about 1% of the coverage afforded to Ford and Carter, each. (Cmpt. ¶62, 63)

7. Ford and Carter were nominated by party conventions, covered live by all three Defendant networks; whereas, McCarthy has not taken part in any party convention of any type in 1976. (Judicial notice.)

8. Despite the relative paucity of regular news coverage of McCarthy (Fact 6), and despite the extensive coverage of the nominations of Ford and Carter (Fact 7), after those conventions Time magazine found,

through the Yankelovich poll, that the relative levels of support were 41% for Carter, 37% for Ford, 12% for McCarthy, and 10% undecided. (Cmpt. ¶47)

9. Ford and Carter would not have agreed to participate in the debates unless:

a. the other also agreed (Cmpt.¶22,24)

b. McCarthy was excluded (Cmpt.¶22,24)

c. Network coverage was assured. (Cmpt.¶56)

10. The Defendant networks were well aware of the conditions set by Ford and Carter, for their participation in the debates, and agreed to same. (Cmpt. ¶61)

11. The Defendant League was also well aware of the conditions set by Ford and Carter for their participation, and agreed to same. (Cmpt.¶61)

12. Ford and Carter were not both committed to the debates until 20 August 1976. (Cmpt. ¶33)

13. McCarthy immediately contacted the League verbally, seeking inclusion in the debates, and followed up by letter. (Cmpt. ¶34)

14. The League's response to the McCarthy request was being held "for retyping" on the date that service was made in the case below. (AAMcC ¶1, Exhibit A)

15. McCarthy was aware of, and had a copy of, a complaint dated 28 August, 1976, to the FCC by Lester Maddox concerning the latter's exclusion from the debates, and was also aware that the FCC, as of the

filing of the above suit, had not even acknowledged receipt of the Maddox complaint, much less set any schedule for action on it. (AAMcC ¶13)

16. If the final votes are similar to the polls, and if the entire undecided vote goes to Ford and Carter only, Ford and Carter together will receive 88% of the votes cast, but only 44% of the electorate, and 56% of the electorate will support McCarthy, or will not bother to vote at all. (Facts 5 and 8, combined.)

II. The Law on Discrimination between Candidates

The Constitution is an absolute barrier to the laws or regulations of any state, or those of the Federal government, or any agency thereof, making it impossible (either absolutely, or in effect) for any candidate to run for any office by discriminating against such candidate based on his political views or political organization. Williams v. Rhodes, 1968, 393 US 23; Jenness v. Fortson, (1971), 403 US 431, especially the last line of Jenness,

> "Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders."

This prohibition against discrimination extends with equal force to independent candidates, who may not be compelled to form or join political parties in order

to run for office. Storer v. Brown, (1974) 415 U.S. 724, 39 L.Ed.2d 714.

The common theme of these decisions, and some 100 other decisions on point, is that the government may set reasonable restrictions on the opportunity to run for office, provided these restrictions are makeable, and meet a "compelling state interest." See Storer, supra, and American Party of Texas v. White 1974, 415 US 767, among many other decisions on point.

Congress is therefore prohibited by Amendments I and V of the Constitution from passing any law which would restrict the presidential choices of the American people to the Republican or Democratic nominees. The FCC is likewise prohibited from adopting an interpretation which would have the same result.

In short, the opportunity of the "major" or "serious" candidates to debate and be heard by the people, free of the crippling effect of including the "fringe" candidates, cannot be interpreted to mean the Republican and Democratic nominees, to the absolute exclusion of all others. U.S. v. LaFranca, 282 US 568, 78 L.Ed. 551.

The concern expressed by Congress was that presidential debates not drown in a plethora of impossible candidacies. In its Order, the FCC showed this

BEST COPY AVAILABLE

concern. And in its decision affirming the FCC Order, in Chisholm, supra, this Court showed that concern. McCarthy also has this concern. But he urges on this Court the point that factual criteria, totally divorced from the political views or associations of any candidate, and meeting a compelling interest of the United States, must exist for the FCC Order, approved in Chisholm, to be constitutional as applied, as opposed to constitutional in the abstract, which has already been decided by this Court.

McCarthy argues that either there is a factual threshold by which any candidate representing any views, a member or not of any political party, qualifies as a "major" or "serious" candidate, or that the FCC Order will result in an oligopoly, or shared monopoly, of the Republican and Democratic parties which will apply not only in this election, but in all elections to come, until and unless Congress chooses to amend the law.

McCarthy points out that if the disgruntled half of the electorate stays home, it is a near certainty that both Ford and Carter, and no one else, will draw 25% or more of the vote that is cast. Only the Republicans and Democrats will qualify as "major parties" for the election of 1980 (under 26 USC 9002(6)), and the stage will be set for the oligopoly to continue, ad infinitum.

The enclosed article by James D. Wright advances this argument more cogently than McCarthy's counsel can, and is attached as Exhibit A, and incorporated herein by reference.

III. Violation of the FCC Order

For the exemption to 47 USC 315(a) that this Court approved in Chisholm to apply, there must be no "broadcaster favoritism". It is alleged that the Defendant networks (who represent both their owned and affiliated stations), were participants in, and fully aware of, the process by which the planned Ford-Carter debates were set up. (Cmpt.¶54, 55, 61)

The argument becomes quite simple. If McCarthy is factually a "major" or "serious" candidate, protected by the policy of Congress, of the FCC, and of this Court, under a constitutional application of the FCC Order, then it is per se favoritism for the Defendant networks to play an essential role in the exclusion of McCarthy.

On the other hand, if McCarthy (or any other candidate who complains of exclusion) is not a "major" or "serious" candidate, as a matter of facts, it is no favoritism, nor a constitutional violation, for the networks to participate in excluding him (or them).

As in many decisions involving Court application of an administrative rule to a specific set of facts, the question is how an admittedly beneficial rule can be applied without constitutional infirmity. (citations omitted)

(NOTE FOR THE COURT: Over the weekend counsel for McCarthy received word from counsel for Maddox that Mr. Maddox's complaint was denied (as expected) in a delegated decision by the Chief of the Broadcast Division of the FCC. Counsel for McCarthy does not have that decision in hand as yet, but will supply it to the Court and all counsel before hearing on this matter. Counsel also heard from the UPI Monday afternoon that the Socialist Workers Party had a similar complaint, similarly denied. On information and belief, the delegated decision on Maddox will be appealed to the Commission itself, and the Commission's decision will also be supplied to the Court and all counsel, when available.)

IV. Basis of Relief

Counsel for the FCC conceded in the Court below, as did counsel for the networks, that the Appellant's legal position is correct, that the FCC has no authority to provide any mandatory or injunctive relief prior to

a violation. See 47 USC 303, and FTC v. Dean Foods (1966), 384 US 597; Scripps-Howard Radio v. FCC (1942) 316 US 4.

The only pre-violation relief possible from any source, would have to be from a Court, pursuant to its general equitable powers. 28 USC 1651(a); Sampson v. Murray, (1974) 415 US 61,39 L.Ed.2d 166; U.S. v. McIntire, (1973) 365 F.Supp. 618.

It is settled law that prior restraint on speech is possible, but bears a strong presumption that it is constitutionally unacceptable. (citations omitted, both the Appellants' and Appellees' briefs below cover this point fully). This heavy burden of proof must be borne by McCarthy.

There is no case law, other than Chisholm, discussed above, on presidential debates. There is no case law that Appellants are aware of on remedies for exclusion from debates. There are, however, three administrative determinations of the FCC on exclusion from debates: William Ryan and Paul Dwyer, 14 FCC2d 364; Socialist Workers Party, 20 Rike and Fisher 443; and Conservative Party, (1962), 40 FCC 1086.

McCarthy emphasizes that none of these challenges were brought before the debates took place. All were claims for equal time after the exclusion had occurred.

The remedy in each case was to give an equal amount of prime time to the excluded candidates.

In one of the challenges (Ryan & Dwyer) the excluded candidates argued that separate but "equal" time after the fact was not truly equal to being included in the debate. McCarthy points out, however, that they advanced no facts to support this claim, and that they made it too late, and to the wrong forum, to obtain different relief even if they had proved their entitlement to it. In these decisions, the FCC followed its normal conclusion that prime time equals any other prime time, without any analysis such as the following.

It has been alleged that presidential debates are the most important single events in any candidate's campaign, and that in the 1960 Kennedy-Nixon debates they were the decisive factor in the victory of President Kennedy. (Cmpt. ¶39, ignore typographical error of 1968 for 1960) The Kennedy-Nixon debates were watched by millions more people than were any other aspect of the campaign conducted by either of those candidates. They gave the deliberate impression that only one of those two could possibly be elected. (Cmpt.¶41, 42; AAMcC ¶8,9) It is also alleged that a presidential debate is a unique opportunity for voters to compare candidates, and chose among them. (Cmpt. ¶60) On these facts, the debates of 1976 can be expected to be likewise unique, and perhaps

decisive, with the conclusion following that the exclusion of McCarthy causes irreparable damage, both to him, and to his potential voters. (Cmpt. ¶44,45)

Lastly, in its oral opinion from the bench the Court below stated that it was dismissing the complaint because it did not believe the public interest would be served by enjoining the Ford-Carter debates. Presumably, the same view will be stated in the lower court's written opinion, not yet available. In most cases where the public interest is involved, the weighing of that interest is a very non-specific and delicate task for the Court. (citations omitted) Unlike most such cases, in the instant case there are measurements available.

Perhaps the most important index is that only 44% of the electorate (if all of the undecided voters are included) now intend to vote for Ford and Carter combined. 56% of the electorate intends to vote for other candidates (primarily McCarthy), or will not vote at all. This court can take judicial notice that in this century, and in the history of the nation, there have been few presidential elections decided by margins of 56% to 44% or higher.

Further, on the pleadings, it is clear even among some supporters of Ford or Carter that a three-way

debate, rather than a two-way one, is in the public interest. Note that Appellant Annie Laurie K. Lyon, is a potential Ford voter, who wants a three-way debate (Cmpt. ¶ 5, 37 and 38), and Appellant Robert M. Bloom is a potential Carter voter who wants a three-way debate (Cmpt. ¶6, 37 and 38). On the allegations, the Appellant voters represent the entire spectrum of potential voters, committed to Ford, Carter or McCarthy, undecided, and not intending to vote at all--a total of about 140 million Americans.

On the public interest point, in addition to the Oklahoma Supreme Court decision cited in McCarthy's brief below (copies of slip opinion, filed), two more decisions striking down state law as unconstitutional, and finding that McCarthy is a serious candidate and entitled to ballot access without petitions, have reached counsel for Appellants. They are: McCarthy v. Tribbett, U.S. Dist. Ct. for Delaware, CA 76-300, 16 Sept. 1976; and McCarthy v. Askew, U.S. Dist. Ct. for Dist. of Florida, 76-1460-CIV-NCR, 15 Sept. 1976. Slip opinions for both are attached. McCarthy draws the Court's attention to the following language from Askew:

> "Contrary to the State's position, the evidence before the court shows that Mr. McCarthy has considerable support around the nation: it ranges from 10% in the Harris poll to 12% in Time's Yankelovich poll. Because there is nothing before the court to indicate that the voting population in Florida differs significantly from that in other parts of the

country, Mr. McCarthy must be considered a serious candidate in this state.

"The court concludes on the legal merits of plaintiffs' complaint that it would be an unconstitutional abridgement of plaintiffs' rights to deny Eugene McCarthy [ballot position]. The court is also satisfied that the prerequisites to granting injunctive relief have been met....

"The court must point out that the lack of a statutory route to be on the ballot as an independent presidential candidate does not open the door to frivolous candidacies. There must be a showing of substantial support, as Senator McCarthy has, before an independent candidate's name can be placed on the ballot for President." (slip opinion, pp. 6 and 7)

Of what use is a constitutionally guaranteed right to ballot access for a serious candidate for President, if he can be constitutionally barred from participation in the most important single method of reaching and persuading the nation's voters that has ever been developed? (See Cmpt. ¶44, AAMcC ¶8)

To the question of relief McCarthy would add only that the seriousness of the harm to some extent is weighed in balance along with the probability of success. When attorneys for clients condemned to death under statutes just declared constitutional in an exhaustive Supreme Court decision, filed a petition for rehearing, Mr. Justice Powell granted a stay pending re-argument this fall. See 19 Criminal Law Reporter 4112

(22 July 1976). There could hardly be a case in which the probability of success was lower. Yet Mr. Justice Powell granted the stay, recognizing the parties would otherwise be executed.

Political execution is the issue here, the giving of the clear impression to perhaps 100 million Americans simultaneously that only Ford or Carter can possibly be elected president. On the other hand, the Appellees would suffer almost no harm from a stay. The promptness of the Appellee networks in setting aside portions of their expensive and important fall schedules for all three debates demonstrates that a delay of a few days in the first debate would be met by rescheduling it. If, of course, the Appellants prevail finally on the facts and the law, none of the Defendants have any vested interest in seeing the Constitution violated.

McCarthy feels certain that a definitive ruling of any Court would be followed in spirit by the League of Women Voters. Were they, then, to invite him to join the debates, the networks would still cover the debates if Ford and Carter appear. The sole question is whether Ford or Carter would withdraw. In the public interest, McCarthy feels they would still participate.

Perhaps the best illustration of the degree to which the Appellees have turned the principle of freedom of speech on its head, is the fact that no court could

conceivably order Ford, Carter, McCarthy, or any other candidate to speak at any set time and place. If McCarthy, under the Constitution, must be included in any debate under the FCC Order, for that order to remain constitutional as applied, then the decision as to whether the debates go on with three participants will rest with the unfettered and free choice of Ford and Carter to debate along with McCarthy. If the debates are then cancelled, it will be the fault of those candidates, but not of this or any other Court. The Appellees Ford and Carter cannot be heard to argue that their freedom of speech includes the right to compel and receive from the Appellee networks a tripartite agreement to violate the Constitution.

V. Summary

For the reasons stated, and others to be advanced at oral argument, the Appellants submit that this Court should enjoin the Defendant networks from broadcasting any Ford-Carter debate for a period of five to seven days, and remand this matter to the District Court to determine whether the factual allegations are

true; if so, to make the injunction permanent.

Respectfully submitted,

David Meyers
1015 20th Street, N.W.
Washington, D.C.

Craig Sawyer
National Press Building
14th & F Streets, N.W.
Washington, D.C. 20004

John C. Armor

Philip L. Marcus
Suite 425, The Rotunda
711 W. 40th Street
Baltimore, Maryland 21211
301 235-6175
Attorneys for the Appellants

THE SUNDAY SUN
BALTIMORE, MD.
SEPTEMBER 19, 1976
SECTION K *

EXHIBIT A

The U.S. voters' apathetic

By JAMES D. WRIGHT

Perhaps the most significant aspect of the coming election will be not the coalitions which propel the winner to victory, but the immense numbers of eligible voters who don't vote at all. Rates of political participation in the United States have been steadily falling for more than a decade now. Current projections indicate that the turnout for the 1976 election will be the lowest in modern political history. Precise figures are difficult to come by, but the best guess is that far fewer than half of those eligible to vote actually will. So once again, the preferences of the minority will dictate who rules us all.

Declining participation has been accompanied by increasing suspicion and hostility towards the political system and its incumbents. Surveys conducted at the University of Michigan show that the proportion of the population who feel that "the government in Washington can be trusted to do what is right" all or at least most of the time dropped from 78 per cent to 37 per cent between 1964 and 1974.

James Wright is a sociologist at the University of Massachusetts, and author of "The Dissent of the Governed: Alienation and Democracy in America."

Similar trends have been shown on many other indicators of political alienation, discontent, and distrust. However measured, apathy and alienation are on the rise.

From the viewpoint of democratic theory, these trends are cause for alarm. "Eternal vigilance," Thomas Jefferson counseled, "is the price of liberty," yet there is precious little vigilance to be found when more than half the electorate opts not to vote. Nor is there any longer much of that confidence and trust in the political leadership which modern theory says is essential for stable and effective democracy.

Jefferson's animating vision of a democratic government based on "the will of the whole society" is being threatened, it appears, by the widespread belief that politicians, if not the entire political system, are evil and corrupt, and that it matters little whether one participates or not. What, then, accounts for the trends? And what do they portend for the American political future?

Most of the academic research on these topics has attempted to link the rising apathy and alienation to changes in the electorate itself. In the last 15 years, for example, the electorate has become much younger, the older cohorts dying off and being replaced by new (and presumably more skeptical) voters socialized in the 1960's.

It would be convenient if this were a sufficient explanation, but it is not. The fact is, younger and better-educated people are consistently less alienated from politics than other population groups. The true cause of rising suspicion and distrust lies not with the characteristics of voters themselves, but with the actions of political elites. People trust their leaders less these days for a very simple reason: their leaders have consistently shown themselves unworthy of public trust.

The handling of American policy in Vietnam is the obvious case in point. Part of the "choice" in the "Choice, Not an Echo" presidential campaign of 1964 was between one candidate, Lyndon B. Johnson, who promised not to involve the United States in a distant war that "the Asians should fight for themselves," and another, Barry Goldwater, who thought and said that American interests in Southeast Asia warranted a greater military effort.

The Johnson landslide reflected, at least in part, a majority preference that the war not be escalated, which, of course, it almost immediately was—an object lesson that "people like me" really don't have much say about the direction of American foreign policy, that a politician's word really ought not to be trusted.

Likewise, Richard M. Nixon's thin victory over Hubert H. Humphrey was due in large measure to Mr. Humphrey's identification with LBJ's Vietnam policies and to Mr. Nixon's promise of a "secret plan" to end the war. But the secret plan proved evanescent and American involvement persisted much the same as always—that is, until the next election, where the prospects of a victorious insurgency by George McGovern at last forced an American extrication.

If there is a single political lesson to be drawn from the history of American involvement in Vietnam, it is that the course of public opinion on the significant issues of the day has little perceptible influence on the conduct of U.S. policy. Judging from the trends discussed above, this lesson was not lost on very many people.

Vietnam ended at about the same time Watergate began—the first demonstrating that the political leadership was arrogant and secretive, the second, that elites were cynical, manipulative, and corrupt. The Watergate burglary itself was perhaps the least offensive of the chicaneries that came to light, including attempts by the President to obstruct justice, his aides extracting bribes for political favors, even use of the CIA, FBI and IRS for partisan purposes.

It is difficult to profess much trust or confidence in elites after all this. Perhaps the most informative poll conducted dur-

See APATHY, K2, Col. 1

BEST COPY AVAILABLE

revolt

THE POLITICAL PROBLEM.
The law-maker and law-breaker—one and inseperable.

Thomas Nast, April 15, 1871

Voter alienation

APATHY, from K1

ing the Watergate scandals was the one showing a majority who thought these activities were more or less customary behavior for politicians, that the corruption differed in degree but not in kind from what one normally expected of persons in power.

One needn't dwell on the point here. The judgments that politicians are often corrupt and evil, that public opinion doesn't count for much, that participation has become a futile, useless exercise all have a substantial basis in fact. It is the political leadership itself, not the public, that bears responsibility for the alienation sweeping the land.

among younger voters, they outnumber Democrats as well. But in the absence of a party or a political organization to mobilize their ranks and channel their discontent, the independents have no choice but to vote Republican, vote Democratic, or not vote at all.

The impending death of one or the other major party has been ominously announced after every presidential landslide, but the defeated party has always bounced back, often with notable strength. And now, federal funding of presidential campaigns greatly facilitates the persistence of the extant two-party system. (The legal difficulties in getting third parties on the ballot, faced again this year by Eugene McCarthy, also show how firmly the

Academics and political commentators have recently drawn parallels between contemporary America and the Weimar Republic era in Germany. The conventional wisdom is that Adolf Hitler's successes came from an outpouring of previously apathetic, alienated voters who felt he would correct the humiliations of Weimar and restore order to German society. Do increasing apathy and cynicism make similar developments possible, even likely, here?

It is often said that they do, but the prospects are actually quite remote. There is, first of all, no apparent political vehicle on the scene that can be effectively exploited by extremists of the right or left. The Republican Party tilted slightly in this direction in 1964 and was thoroughly trounced for it; in 1976, the party showed it had gotten the message. The Democratic Party's experiences in 1972 and 1976 follow the same general pattern.

The closest approximation of a successful political insurgency in recent years is George C. Wallace's run for the presidency in 1968. He worked outside the established party structure and attempted to exploit an atmosphere of turmoil and unrest, appeared as a third-party candidate on the ballots of all 50 states (a very impressive legal and organizational achievement) but lost by a national margin of nearly seven to one.

And what is his party offering up now that Mr. Wallace has passed from the scene? For President: Lester Maddox, probably the most ridiculous figure currently active in American politics; and for Vice President: William Dyke, a former mayor of Madison, Wis., whose first prominent media exposure was as resident clown on a local afternoon children's television show.

American political history since 1964 makes it clear that the electorate is not attracted to extremist political movements. The history is actually even clearer than that: the mere suspicion of extremism seems sufficient to insure defeat. This contrasts sharply with the Weimar experience, where parties on both extremes enjoyed sizable mass followings.

In Germany too, vigor at the extremes was met with vacillation and decay in the "responsible center," and here, perhaps, the Weimar analogy is more appropriate. Neither of the American center parties has shown much enthusiasm for able and decisive leadership, which may explain why popular identification with them has also been falling regularly over the last several years. In the total electorate, independents now outnumber Republicans; current arrangements are written into law). Legal restrictions and federal provisions are not going to be affected much by the alienation and apathy of the mass, nor by implication, is the future of the two-party system.

The one necessary and certain effect of rising apathy, largely overlooked in the commentary to this point, is that the decision about who will govern this country will be based on progressively smaller portions of the U.S. population, that a large and growing body of opinion will simply not be there contributing to the ongoing political life of the country. And whose opinion is it that will be subtracted out? The opinion, by and large, of the have-nots: the poor, the black, the elderly, the working class.

The normal tendency in all elections is that the higher strata participate far more than other sectors of the society; the implication is that political outcomes usually benefit those who are already better off. Recent increases in apathy can only sharpen this tendency.

Thus, declining interest and participation in politics will serve to exacerbate the unequal distribution of resources in the society and will make it easier for the haves to consolidate and strengthen their privilege. Increasing apathy will make American society (founded, it is said, on principles of democracy and equality) less democratic and less equal than it could otherwise be.

Will the probable Jimmy Carter landslide turn the apathy and alienation trends around? Mr. Carter is being presented as a genuine "people's candidate." His nomination in some sense signals a triumph of popular preferences over the wishes of party bosses. And certainly, Mr. Carter sees himself as the candidate who will restore confidence and reclaim public trust. But it must be remembered that, if current projections are accurate, more than half the electorate already has decided that Mr. Carter is not sufficiently distinct to warrant the efforts necessary to register and vote.

The trends of the last decade will not be reversed by a single event, a galvanizing and charismatic personality, or a landslide election mandate. They will reverse when their causes are removed, when the elected leadership demonstrates that it is capable of more than it has shown in the recent past. What the recent past shows, of course, is that this will be far more difficult to accomplish than a mere electoral victory.

iii

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

No. _____

EUGENE McCARTHY, THOMAS McCANNE, ANNIE LYON, ROBERT BLOOM, SUZANNAH B. HYATT, MARY MERRILL, JUDITH DELPHIA, and WILLIAM NERIN

PETITIONERS

v.

JAMES CARTER, GERALD FORD, 1976 DEMOCRATIC PRESIDENTIAL CAMPAIGN, INC., PRESIDENT FORD COMMITTEE, LEAGUE OF WOMEN VOTERS EDUCATION FUND, AMERICAN BROADCASTING COMPANIES, INC., CBS, INC., NATIONAL BROADCASTING SYSTEM, INC., and THE FEDERAL COMMUNICATIONS COMMISSION

RESPONDENTS

* * *

No. _____

EUGENE McCARTHY

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

RESPONDENT

* * *

APPLICATION FOR INJUNCTION PENDING REVIEW, PRIOR TO JUDGMENTS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold Buchman
540 Tower Building
Baltimore, Maryland 21202

David Meyers
1015 20th St., N.W.
Washington, D.C.

John C. Armor & Philip L. Marcus
425, 711 W. 40th Street
Baltimore, Maryland 21211
Attorneys for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

No. _____

EUGENE McCARTHY, THOMAS McCANNE, ANNIE LYON, ROBERT BLOOM, SUZANNAH B. HYATT, MARY MERRILL, JUDITH DELPHIA, and WILLIAM NERIN

PETITIONERS

v.

JAMES CARTER, GERALD FORD, 1976 DEMOCRATIC PRESIDENTIAL CAMPAIGN, INC., PRESIDENT FORD COMMITTEE, LEAGUE OF WOMEN VOTERS EDUCATION FUND, AMERICAN BROADCASTING COMPANIES, INC., CBS, INC., NATIONAL BROADCASTING SYSTEM, INC., and THE FEDERAL COMMUNICATIONS COMMISSION

RESPONDENTS

* * *

No. _____

EUGENE McCARTHY

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

RESPONDENT

* * *

APPLICATION FOR INJUNCTION PENDING REVIEW, PRIOR TO JUDGMENTS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and Circuit Justice for the District of Columbia Circuit:

Petitioners pray that an Order be entered enjoining each Respondent, except the Federal Communications Commission, from participating or performing in any way in any "presidential debate", pending further Order of this Court.

This relief is sought pending consideration of a Petition for Writs of Certiorari prior to judgments of the Court of Appeals, in both cases herein.

Jurisdiction to enter such an Order in 28 USC 1651. Authority for a single Justice to act is found in S.Ct.R. 50 and 51.

History of the Litigation

One of the cases herein, McCarthy, et al v. Carter, et al, was filed in the United States District Court for the District of Columbia on 10 September, 1976, prior to the first "presidential debate." The District Court dismissed, and the Court of Appeals for the District of Columbia Circuit denied relief pending appeal, both on grounds of jurisdiction, holding that proper application lay to the Federal Communications Commission for declaratory relief, recognizing that injunctive relief, if any, could

only be granted by a Court, thereafter.

The other case herein, McCarthy v. Federal Communications Commission, began as a complaint to the FCC on 24 September, 1976, immediately following the first "debate" and two days after the Court of Appeals decision in the first case mentioned herein. The FCC Order, of or about 4 October, 1976, denied the relief applied for. Notice of Appeal was immediately made to the Court of Appeals for the District of Columbia Circuit, accompanied by a Motion for Consolidation with McCarthy, et al v. Carter, et al. Further, application to said Court was made, in both cases, for immediate injunctive relief.

Because of the public importance of the underlying issue in both of these cases, and the need for speedy adjudication, immediately after the appeal of the FCC Order to the Court of Appeals, application was made, simultaneously herewith, to this Court for review by way of certiorari of both cases before judgment. Application to both this Court and the Court of Appeals below is made virtually simultaneously because of the time element involved and to allow maximum flexibility to both Courts.

Argument

The Court is referred to the "Reasons for Granting

Writs", in the accompanying Petition for Writs of Certiorari.

Relief Requested

Petitioners respectfully pray an Order be entered enjoining Respondents Carter, Ford, 1976 Democratic Presidential Campaign, Inc., President Ford Committee, League of Women Voters Education Fund, American Broadcasting Companies, Inc., CBS, Inc., the Public Broadcasting System, and National Broadcasting System, Inc., from participating or performing in any way in any "presidential debate", which excludes Petitioner McCarthy from identical participation to that of Ford and Carter, pending further Order of this Court.

Respectfully submitted,

Harold Buchman
540 Tower Building
Baltimore, Maryland 21202

David Meyers
1015 20th Street, N.W.
Washington, D.C.

John C. Armor
425, 711 W. 40th Street
Baltimore, Maryland 21211

Philip L. Marcus

Philip L. Marcus
425, 711 W. 40th Street
Baltimore, Maryland 21211
Attorneys for Petitioners

THE UNDER SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

SEP 30 1976

Dear Mr. McCarthy:

This is to confirm our telephone conversation of September 30, 1976, in which I advised you that Secretary Simon, after consultation with the Advisory Committee on Protection of Major Candidates pursuant to the provisions of P.L. 90-331, has determined that your request for Secret Service protection should be granted.

You will be contacted by representatives of the Secret Service in the near future, who will arrange the necessary details with you and members of your staff.

Sincerely yours,

/s/ Jerry Thomas

Jerry Thomas

The Honorable
Eugene J. McCarthy
1440 N Street, Northwest
Washington, D. C. 20005

EXH. I

BEST COPY AVAILABLE